92-1041

Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States
October Term, 1992

CLARENCE TRIGG, Superintendent,
Indiana Youth Center,

Petitioner,

v.

JERRY KEOWN FORBES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit properly expanded the list of due process rights in prison disciplinary hearings set forth by this Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), by adding a right to compulsory process to force witnesses to attend and testify.

2. Whether the Seventh Circuit properly added to the *Wolff* rights a right to "meaningful" administrative review of prison disciplinary sanctions.

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v.

JERRY KEOWN FORBES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in the case of *Jerry Keown Forbes v. Clarence Trigg*, 976 F.2d 308 (7th Cir. 1992).

That decision declared unconstitutional a policy of the Indiana Department of Correction (IDOC) which permits prison employees to decline to appear as witnesses in prison disciplinary hearings, and also held that inmates found guilty in such hearings have a right to "meaningful" administrative review. Finding that those rights were not violated in this case, the court of appeals affirmed the district court's denial of habeas corpus relief, but declared the IDOC witness rule to be unconstitutional and "encourage[d]" IDOC to enact a new rule.

OPINIONS BELOW

The decision of the Seventh Circuit is reported at 976 F.2d 308, and is reproduced in the Appendix at page 1a.

The decision of the district court denying the writ of habeas corpus is not reported, and is reproduced in the Appendix at page 23a.

JURISDICTION

The judgment to be reviewed was entered on September 15, 1992. A petition for rehearing and suggestion of rehearing in banc was filed on September 30, 1992 (with leave of court to be filed instanter). It was denied on October 21, 1992.

This Court has jurisdiction to review the judgment of the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND POLICY INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ..

The texts of Ind. Code §§ 11-11-5-5 and 35-50-6-4 through 35-50-6-5.5 (1988) are set out in the Appendix at 52a.

Pertinent portions of IDOC Adult Disciplinary Policy Procedures (1990), Parts 22(B) ("Witnesses"), 24(D) & (E) ("Additional Offender Rights"), and 25 ("Offender Appeals") are set out in the Appendix at 48a.

STATEMENT OF THE CASE

Facts

Respondent Jerry Forbes, an inmate at the Indiana Youth Center ("IYC"), refused an order to submit a urine specimen and was charged by Sgt. Clinton Crider with refusing to obey an order, a class C offense under the IDOC Adult Disciplinary Policy. When a copy of the charging report was given to Forbes, he listed IYC Superintendent Trigg, chief security officer Major Alexander, and Sgt. Crider as witnesses to be called at his disciplinary hearing.

Each "witness" was sent a notice that his presence had been requested by Forbes. The Superintendent and the Major indicated on their notices that they refused to appear without further explanation. Sgt. Crider also refused, and wrote, "I can not witness because I am the author of the report." These refusals were permissible under an IDOC policy stating that persons requested to serve as witnesses in disciplinary hearings "are not required to appear and testify." The same policy also permits a requested witness to submit a written statement in lieu of personal appearance. (App. 49a.)

A hearing on the disciplinary charge was held before a three-member Conduct Adjustment Board (CAB). Forbes admitted that he had refused to give a specimen but argued that he should not have been ordered to do so. The CAB found Forbes guilty of refusing to obey an order on the basis of his admission. The CAB recommended that Forbes be deprived of 30 days of earned credit time, which recommendation was approved by the Superintendent under IDOC rules.

Forbes appealed to the Superintendent,[1] raising eight grounds for review including the CAB's refusal to compel the attendance

---

[1] An appeal to the commissioner of IDOC is authorized by Ind. Code § 35-50-6-5.5 (1988) (App. 57a), and IDOC policy provides for intermediate review by the institution head (IDOC Adult Disciplinary Policy Procedures at 30-31, App. 50a-51a).

of the witnesses he requested. The Superintendent denied the appeal, finding "no reason sufficient to warrant reversal" of the CAB's decision.

Forbes next appealed to the IDOC Director of Adult Offender Services, resubmitting his original appeal and adding a claim that he had been denied a fair and impartial appeal at the institutional level because the Superintendent had already approved the CAB sanction before Forbes' appeal was filed. The appeal was denied.

District Court

Forbes then filed a petition for a writ of habeas corpus in the district court under 28 U.S.C. § 2254, asserting that the deprivation of earned credit time violated his right to due process in several respects, four of which were summarized by the district court as follows:

> 4) He was denied the right to call witnesses at the disciplinary hearing;
>
> 5) He was deprived of the right to confront and cross-examine witnesses at the hearing;
>
> 6) He was denied the right to pursue a meaningful administrative review of the CAB hearing when the IYC Superintendent affirmed the CAB's action before his time for appeal had expired;
>
> 7) He was deprived his right to an adequate record of the events at the hearing . . . .

(App. 28a.)

The district court denied the petition. It found that in the absence of a suggestion that the testimony of the requested witnesses would or could have contributed to Forbes' defense, and because calling them would have been burdensome, the

failure to compel the witnesses' attendance "was not arbitrary" and did not deprive Forbes of due process. (App. 34a.) The district court also found that the Superintendent's "dual role" as approver of CAB sanctions and reviewer of appeals actually provided an additional safeguard to the process (App. 35a-36a), and that the "record" of the CAB hearing was "sufficient to permit meaningful review" (App. 39a).

Court of Appeals

The court of appeals concluded that the IDOC rule permitting inmates and staff members to refuse to appear and testify at disciplinary hearings "violates Ind. Code Ann. § 11-11-5-5(5) (Burns 1988) and the Due Process Clause of the Fourteenth Amendment of the Constitution." (App. la-2a.)[2] The court held that the CAB must determine on a case-by-case basis whether there are legitimate reasons to permit a witness to refuse to attend the hearing, and that the reasons listed in § 11-11-5-5(5) would be acceptable. (App. 16a-17a.) The court did not address the question of how the witnesses would be compelled to attend, or whether they should be forced to testify once present.

The court of appeals found that on the facts of this case, due process was not denied by the refusal to call Forbes' requested witnesses. However,

> [i]n any other context, where the underlying facts of the charged misconduct are in issue, *the testimony of the charging officer would be relevant (and perhaps indispensable)*, and prison officials would have to offer some penological justification . . . for refusing to call such a witness.

---

[2] Ind. Code § 11-11-5-5(5) provides that the inmate is entitled to call witnesses unless doing so would subject the witness to harm or the testimony would be irrelevant or repetitive. Subsection (6) entitles the inmate to confront and cross-examine witnesses with the same exceptions, or unless the witness is unavailable "for good cause." Basically identical rights are contained in Ind. Code §§ 35-50-6-4(c) and 35-50-6-5(b) (1988). These statutes are reproduced in the Appendix at 52a-57a.

(App. 18a, emphasis added.) Refusing to compel the attendance of Trigg and Alexander was deemed acceptable on the silent record, since "[r]equiring high-ranking correctional officials who are not involved in the charged conduct to testify presents the danger that inmates might abuse the opportunity, disrupting the institution and undermining those officials' authority." (App. 18a.)

As to the adequacy of the administrative appeal, the court of appeals wrote:

> [Forbes] relies upon *Smith v. Stoner*, 594 F.Supp. 1091 (N.D. Ind. 1984) for the proposition that administrative review must be meaningful, and not "merely pro forma." *Id.* at 1110. *Smith is correct*, but the facts in that case are a far cry from those presented here.

(App. 20a, emphasis added.) Thus the court held that Indiana inmates are entitled to a "meaningful" administrative appeal.

The court of appeals concluded as follows:

> [W]e AFFIRM the district court's judgment on the remaining claims, but find the IDOC rule that provides offenders (inmates) and staff requested to serve as witnesses in disciplinary hearings are not required to appear and testify . . . is unconstitutional, and encourage the IDOC to enact a rule in conformity with this opinion.

(App. 22a.)[3]

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[3]The court of appeals also found that a claim regarding administrative segregation had become moot, and that the urine test refused by Forbes did not violate the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S HOLDING THAT PRISON INMATES ARE ENTITLED TO COMPULSORY PROCESS IN DISCIPLINARY PROCEEDINGS CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT, AND WITH THE HOLDINGS OF THIS COURT.

By invalidating IDOC's policy permitting prison employees to refuse to attend prison disciplinary hearings at the request of the charged inmate, and holding that employees must be forced to attend and testify at the hearings, the Seventh Circuit has effectively granted inmates a right to compulsory process not unlike the right granted to criminal defendants under the Sixth Amendment. This holding conflicts with the decision of another court of appeals on the same matter, U.S. Sup. Ct. R. 10.1(a); and it decides an important question of federal law in a way that conflicts with applicable decisions of this Court, U.S. Sup. Ct. R. 10.1(c).

A. Conflict Among the Circuits

The Seventh Circuit's decision conflicts with the decision of the Eighth Circuit in *White v. Wyrick*, 727 F.2d 757 (8th Cir. 1984). In *White* the court found that this Court did not address the issue of compulsory process in its seminal decision on prison disciplinary proceedings, *Wolff v. McDonnell*, 418 U.S. 539 (1974), and held that there is no due process right to compulsory process in such proceedings. 727 F.2d at 758. The Eighth Circuit also held that the existence of a state regulation which may provide a right to compelled attendance of witnesses does not create an identical federal right, 727 F.2d at 758 n. 2, which is contrary to the Seventh Circuit's apparent reliance on Indiana law in the instant case. (See App. 1a-2a, 16a-17a, citing Ind. Code § 11-11-5-5 (1988).)

The Seventh Circuit cited other decisions, but in fact only one of them held that staff witnesses may not refuse to appear,

and that staff members should be "encourage[d], if not compel[led]," to appear. *Dalton v. Hutto*, 713 F.2d 75, 77-78 (4th Cir. 1983). The other cases cited by the Seventh Circuit invalidated blanket policies *forbidding* the calling of witnesses, but did not address compulsory attendance. See *Ramer v. Kerby*, 936 F.2d 1102 (10th Cir. 1991) (official policy prevented calling staff witnesses); *Bartholomew v. Watson*, 665 F.2d 915, 918 (9th Cir. 1982) (same); *King v. Wells*, 760 F.2d 89, 93 (6th Cir. 1985) (hearing officer had policy of not permitting witnesses under any circumstances); *Hayes v. Walker*, 555 F.2d 625, 629 (7th Cir.), *cert. denied* 434 U.S. 959 (1977) (disapproving "automatic exclusion of the right to call witnesses").

The conflict between the Eighth Circuit (against compulsory process) and the Fourth and Seventh Circuits (in favor of compulsory process) leaves corrections officials across the country in doubt as to the extent to which witnesses should be compelled to attend prison disciplinary hearings. The conflict should be resolved by this Court.

B. Conflict With Decisions of This Court

1. In *Wolff* the Court set out the minimum procedural protections that must be accorded in prison disciplinary proceedings. The Court noted that such proceedings "are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." 418 U.S. at 556; see also *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976); *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 456 (1985).

Wolff was intended to be a *complete* list of the federally mandated rights in prison proceedings:

> Our conclusion that some, but not all, of the procedures specified [in other cases] must accompany the deprivation of good time by state prison authorities is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will re-

> quire further consideration and reflection of this Court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.

418 U.S. at 571-572 (footnotes omitted). Expansion of the *Wolff* rights is therefore inconsistent with *Wolff*. *Baxter*, 425 U.S. at 324; see *Ponte v. Real*, 471 U.S. 491, 496 (1985) ("Eleven years of experience since our decision in *Wolff* does not indicate to us any need to now 'prescribe' as constitutional doctrine that the disciplinary board must state in writing at the time of the hearing its reasons for refusing to call a witness.").

With respect to witnesses, *Wolff* held that the charged inmate should be "allowed to call witnesses," but not without restriction. Prison officials are granted discretion to "refuse to call witnesses," and the reason for the refusal need not be stated. 418 U.S. at 566-567. The Court refused to prescribe confrontation or cross-examination of adverse witnesses. *Id.* at 567-569. The Court mentioned in a footnote the different approaches that the circuits had taken regarding the calling of witnesses, *id.* at 572 n. 20, but did not hold that the right to "call" witnesses included the ability to force them to attend or to testify.

These holdings were reiterated in *Baxter v. Palmigiano*, in which the Court declined to require that an explanation be given if an inmate is denied confrontation or cross-examination. 425 U.S. at 320-323. In *Ponte v. Real*, the Court held that officials must have a reason for *refusing* to call a witness requested by the inmate, although the explanation need not be recorded at the time of the hearing. 471 U.S. at 497-499. The Court also signaled disapproval of " 'across the board' policies denying witness requests . . .." *Id.* at 496.

The Seventh Circuit's holding that an inmate has the right to *compel* the attendance and testimony of staff witnesses goes

far beyond, and therefore conflicts with, the holdings of *Wolff*, *Baxter*, and *Ponte* in two important respects.

First, compulsory process is absent from the catalog of procedural rights set forth in *Wolff*. Indeed, it is precisely the sort of right which, if applied to prison hearings, would convert them into criminal trials. Whether *Wolff* is to be expanded by the addition of compulsory process is a decision that should be made by this Court.

Second, by holding that the reporting officer's testimony is "relevant (and perhaps indispensable)" (App. 18a), the decision below contravenes *Wolff*'s holding that cross-examination and confrontation are not required. 418 U.S. at 567-569. Since the reporting officer has already submitted a written conduct report in every case, in most cases the only purpose for his or her attendance at the hearing would be cross-examination as to the details of that report.

2. Apart from its expansion of the basic rights set forth in *Wolff*, the court of appeals' due process analysis is flawed in another respect. The lower court relied heavily on Indiana law in finding that the IDOC rule is invalid, and even held that the rule violates Ind. Code § 11-11-5-5(5). (App. la-2a.)

Whether it does or not, state procedural rules do not create federal constitutional rights. *Hewitt v. Helms*, 459 U.S. 460, 471 (1983); *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989). Moreover, violations of state law are not cognizable on federal habeas review. *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475 (1991).

3. The lower court's expansion of *Wolff* and its reliance on Indiana law have muddied the parameters of due process in prison hearings. The resulting conflict among the circuits and with the decisions of this Court requires resolution by this Court.

II. THE HOLDING THAT AN INMATE HAS A DUE PROCESS RIGHT TO "MEANINGFUL" ADMINISTRATIVE REVIEW OF A DISCIPLINARY SANCTION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Indiana provides a two-step process of administrative review of prison disciplinary findings. The Seventh Circuit, citing with approval a 1984 district court decision, held that due process requires that this review be "meaningful".[4] (App. 20a.) This decision conflicts with this Court's decisions, and should therefore be reviewed. U.S. Sup. Ct. R. 10.1(c).

As with compulsory process, the recognition of a right to state review of the deprivation of time credits is an expansion of, and therefore a departure from, the minimum protections set forth in *Wolff*. The issue of whether judicial review is required was left open in *Superintendent v. Hill*, 472 U.S. at 450-451, and the Seventh Circuit itself has recently rejected a suggestion that state judicial review is mandated by the Constitution. *Miller v. Duckworth*, 963 F.2d 1002 (7th Cir. 1992). Yet it has now mandated that "meaningful" administrative review be provided.

The decision is also a classic example of constitutionalizing a gratuitous state procedure. Process is not an end in itself. *Olim v. Wakinekona*, 461 U.S. 238, 250-251 (1983). Once it has been determined that a liberty or property interest exists, as is the case where an inmate's earned credit time has been taken away, the procedural protections required by the Due Process Clause are determined independent of any additional protections granted by state law. *Vitek v. Jones*, 445 U.S. 480, 490 n. 6 (1980); see *Bills v. Henderson*, 631 F.2d 1287, 1296-1299 (6th Cir. 1980).

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[4] In *Smith v. Stoner*, 594 F.Supp. 1091 (N.D. Ind. 1984), the court reviewed hearings that resulted not only in an increase in Smith's time served, but also his removal from a work release program. The district court stressed that "this case is not a typical prison discipline case." 594 F.Supp at 1107. It also recognized that it was going beyond *Wolff* on the issue of administrative review, but apparently based its holding on Indiana law. 594 F.Supp. at 1108.

The Seventh Circuit's novel holding that due process requires review of prison hearings creates yet another new "right" to be pondered by prison officials and litigated in district courts across the country, and also resurrects the discredited notion that state law procedural rights are enforceable through the Due Process Clause. These clear departures from the precedents of this Court require review.

III. SPECIAL AND IMPORTANT REASONS JUSTIFY CERTIORARI REVIEW EVEN THOUGH THE LOWER COURT'S JUDGMENT TECHNICALLY AFFIRMED THE DENIAL OF HABEAS CORPUS RELIEF.

In what can only be described as a Pyrrhic victory, Indiana "won" a technical affirmance of the denial of Forbes' habeas corpus petition. On the way, however, the Seventh Circuit flatly declared IDOC's witness policy unconstitutional, and held on the basis of a single district court decision that inmates have a constitutional right to "meaningful" administrative review of disciplinary sanctions. At one time the invalidation of the state rule alone would have provided the basis for this Court's appellate jurisdiction under former 28 U.S.C. § 1254(2) (1976), and the fact that a state rule has been held unconstitutional still provides a compelling basis for the grant of certiorari.

There are other "special and important reasons" to grant certiorari review of the Seventh Circuit's published decision in this case, which will have enormous impact on the conduct of prison disciplinary hearings in the Seventh Circuit, and potentially across the nation.

The court of appeals has "encouraged" Indiana to redraft its witness policy (App. 22a). But this is encouragement with a stick, because the new rights created by the court of appeals are now "clearly established" in this Circuit and will not be covered by qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Unless the decision is reversed by this Court, Indiana has no real choice but to write compulsory process into its rules.

Thus inmates in Indiana and in other States which attempt to avoid liability under *Forbes* will now have an unprecedented opportunity to harass and disrupt prisons with the frivolous listing of staff and inmate witnesses, knowing that their attendance and testimony must be compelled unless legitimate penological reasons can be articulated. These concerns weighed heavily in the balancing which resulted in the limited rights set forth in *Wolff*:

> Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. . . .
>
> . . . The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.

418 U.S. at 562. The opportunity for inmates to retaliate against officers and other inmates by forcing them to attend and testify at disciplinary hearings will disrupt the balance so carefully considered in *Wolff*.

Compulsory process in disciplinary hearings will also have a direct impact upon prison security, as officers whose primary duty is to guard inmates will spend valuable time attending and escorting reluctant inmates to hearings. (Since the CAB does not have contempt powers, this will often be for the futile purpose of listening to the called inmate witness say, "I refuse to testify.") States will be required to either hire more correctional officers or tolerate understaffing at the risk of security.

Finally, past "violations" based on the now-invalid IDOC rule are indefinitely cognizable in habeas corpus actions, as to which there is no statute of limitations. For example, the Seventh Circuit recently remanded, for reconsideration in light of *Forbes*, a civil rights case in which the disciplinary hearing was held in 1979. *McChristion v. Duckworth*, No. 91-2518 (7th Cir. Oct. 28, 1992) (pertinent portions reproduced at App. 44a).[5]

Certiorari may be granted upon the petition of "any party" to a case in a court of appeals. 28 U.S.C. § 1254(1). The rules of this Court do not limit which party may petition for certiorari. This case illustrates the need to allow a "prevailing" party to seek certiorari where "special and important reasons" compel review: The Seventh Circuit's decision invalidates a state agency rule and establishes new due process requirements for prison disciplinary hearings throughout the Circuit; no district court could conclude that the court of appeals' key holdings are *obiter dicta*. The decision also creates a split among the circuits and substantially departs from this Court's decisions in the area of prison disciplinary hearings.

These are "special and important reasons" for this Court to grant certiorari and review the key holdings of the lower court in this case. U.S. Sup. Ct. R. 10.1.

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[5] It is doubtful that the Seventh Circuit would find that its decision announced a "new rule" which would therefore be unenforceable in habeas proceedings, see *Teague v. Lane*, 489 U.S. 288 (1989), since the *Forbes* decision is couched in terms of a violation of the *Wolff* right to call witnesses. (App. 13a-17a.)

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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[976 F.2d 308 (7th Cir. 1992)]

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2282

JERRY K. FORBES,

Petitioner-Appellant,

v.

CLARENCE TRIGG, Superintendent,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 90 C 1931—**Larry J. McKinney**, *Judge.*

ARGUED JUNE 8, 1992—DECIDED SEPTEMBER 15, 1992

Before BAUER, *Chief Judge*, CUMMINGS, *Circuit Judge*, and FAIRCHILD, *Senior Circuit Judge.*

BAUER, *Chief Judge.* In this appeal, we review the district court's grant of summary judgment on a petition for a writ of habeas corpus in favor of the respondent, Clarence Trigg, Superintendent of the Indiana Youth Center. The petitioner presents four challenges to the district court's denial of his petition for habeas corpus. Although we deny Forbes' petition, we find that the Indiana Department of Corrections' ("IDOC") rule which provides that offenders (inmates) and staff who are requested to serve as witnesses in disciplinary hearings are not required to appear and testify violates IND. CODE ANN.

§ 11-11-5-5 (5) (Burns 1988) and the Due Process Clause of the Fourteenth Amendment of the Constitution.

I. Facts

Forbes was confined at the Indiana Youth Center ("IYC") in Plainfield, Indiana during 1990. On August 7, 1990, Forbes was assigned to work in the Officer's Barber Shop in the IYC Custody Building. He began work in the shop on August 15, 1990. Because the Custody Building houses the visiting room and vending machines that are serviced by outside vendors, inmates working in the building have an opportunity to meet, and potentially to exchange contraband with people from outside the prison. Because of this risk, Custody Building rules provide that inmates working in the building are subject to urine testing for illegal drug use. *See* Criteria for Offenders Assigned to the Custody Building, Issued December 15, 1989 ("Criteria"), and Rules and Regulations Governing Offenders Working in the I.Y.C. Officer's Barber Shop in the Custody Building, Issued March 23, 1990 ("Rules and Regulations"), Appellant's Appendix at 5.

Clinton Crider supervised the inmates working in the Custody Building. Crider stated in an affidavit that all Custody Building workers are tested approximately every ninety days. The Rules and Regulations were posted in the barber shop on a bulletin board approximately ten feet from Forbes' work station. *See* Crider Affidavit, Appellant's Appendix at 3. Prison officials also maintain that Forbes was informed of these rules before he began work in the shop, and received a copy of them. Forbes contends that he was never informed of the urine test requirement and that he never received a copy of the rules. Forbes also states that when he began work in the shop, Crider said he did not like Forbes because Forbes was a "jailhouse lawyer," and that he would try to have Forbes reassigned. Two days after Forbes began work, on August 15, 1990, Crider ordered a urine test for all inmates working in the Custody Building.

Forbes refused the test. Before Crider ordered Forbes to take the test, he advised Forbes of the consequences of taking the test and having a positive result, or of refusing the test altogether. In the refusal form he completed that morning, Forbes stated that he refused because "It is not against the law or rules of IYC to be a drug addict; there is no IYC policy; there is no probable cause." Health Care Services Refusal Form, Appellant's Appendix at 3. Crider charged Forbes with refusal to obey an order from a staff member, a class C offense under the IDOC Adult Disciplinary Policy (the general rules which apply to all inmates). *See* Offense No. 347, Appellant's Appendix at 6. The IYC Rules and Regulations, Section XXII at 69 provide: "*Do what you are told* to do by any staff member. If you feel the order is unjust, *you may request to talk to a staff member* about it *after you have done as instructed.*" (emphasis in original) (quoted in *Forbes v. Trigg*, No. IP 90-1931-C, slip. op. at 4 (S.D. Ind. May 18, 1991)).

On August 21, 1990, the IYC Conduct Adjustment Board ("CAB") held Forbes' disciplinary hearing. Before the hearing, Forbes requested three witnesses: Clarence Trigg, the Superintendent of the IYC, Major Alexander, Crider's immediate superior, and Crider. Trigg and Alexander refused to appear without explanation. Crider refused to appear, stating that "I can not [sic] witness because I am the author of the [disciplinary] report." Notice to Witness/Lay Advocate, Appellant's Appendix at 8.

Forbes also filed a written motion to dismiss the charge, or "for a Finding of Not Guilty." *See* Appellant's Appendix at 10. In this motion, he acknowledged that IYC rules required him to obey staff orders, and that he received copies of these rules. Motion to Dismiss, at 1. Forbes stated, however, that because these rules did not expressly provide for urine testing, he could not be punished for refusing to obey an order requiring one until he was given a written copy of the urine-testing rule. *Id.* He also complained that the IYC's urine-testing procedure turned up false positives because samples were not frozen. Further,

Forbes argued that he could not be punished for refusing to submit to the test because Crider had no reasonable suspicion or probable cause to believe he might be using drugs, and because the test was not administered randomly. Finally, Forbes complained that the CAB procedures violate due process because his witnesses were not compelled, there was insufficient evidence of his guilt, and inadequate written records were kept of CAB proceedings.

Forbes testified at the hearing. The only other evidence presented was Crider's conduct report and Forbes' Health Care Services Refusal Form. The CAB found Forbes guilty of refusing to obey a staff member's order. In the Disciplinary Hearing Report the Board made the following findings:

> CAB [c]onsidered Conduct Report, offender[']s plea and testimony, the findings [a]re, by Forbes #853165 own admission did Refuse an order on 8-15-90, when Sgt. Crider gave offender Forbes #853165 an order to submitt [sic] to a urine specimen, Forbes Refused to submitt [sic] the urine specimen, as Reported by Credible Sgt. Crider, found Guilty.

Disciplinary Hearing Report, Appellant's Appendix at 9. The CAB changed Forbes' work assignment and deprived him of 30 days of good time. After the hearing, Forbes was segregated from the general prison population for 72 hours. Although the CAB had not ordered the segregation, Harley Crabb, the correctional officer who chaired the CAB, ordered that Forbes be segregated because he threatened Crider and another correctional officer. On August 24, Forbes was released from segregation because Crabb determined that Forbes "calm[ed] down." Affidavit of Harley Crabb, Appellant's Appendix at 13.

Forbes appealed the CAB's decision to Superintendent Trigg. Trigg affirmed the CAB's rulings, and Forbes raised a final appeal to John Nunn, the Deputy Commissioner of Operations of the IDOC. Before issuing his denial of Forbes' appeal, Nunn verified with IYC officials that the urine-testing rule had been posted in the Custody Building

on a bulletin board close to Forbes' work station. *See* Memorandum from Paul O'Haver, Assistant Superintendent, IYC to John Nunn, dated August 23, 1990, Appellant's Appendix at 12. In the memo, O'Haver notes that IYC did not have a policy or procedure for urine testing, other than the posted Custody Building rule. *Id.* Nunn's denial letter states:

> All materials relevant to this appeal have been reviewed and there is no evidence of procedural or due process error. The conduct report is quite clear and does support the charge. The sanctions imposed were well within the guidelines of the Disciplinary Code for Adult Offenders and you present no evidence on appeal which would indicate that the action of the CAB should be modified in any way.

Nunn Appeal Denial Letter of 10/2/90, Appellant's Appendix at 11.

Forbes filed this action arguing that the CAB proceeding, the administrative review, and the IYC urine-testing rule are constitutionally infirm. Because the Indiana Supreme Court has held that Indiana courts do not have jurisdiction to review the decisions of prison disciplinary boards, *Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988), Forbes has no state judicial remedies to exhaust. In his petition, Forbes argued that his due process rights include judicial review in the Indiana state courts of the CAB proceedings. Forbes also argued that because he did not have actual notice of the urine-testing rule, he was not obliged to follow Crider's order, and could not be punished for refusing to do so. Further, Forbes contended that the urine-test rule was enforced arbitrarily and that Crider ordered the test to harass him. He renewed his claim that Crider needed probable cause or a "reasonable suspicion" of drug use to substantiate his order requiring Forbes to submit to a urine test. Forbes also challenged his inability to present witnesses at the CAB hearing and the adequacy of the written record of the hearing. He also alleged that the administrative appeal process did not provide a mean-

ingful review of his claim. Finally, Forbes protested his placement in segregation. The district court rejected these claims and dismissed Forbes' petition on Trigg's motion for summary judgment.

II. Analysis

We review a district court's grant of summary judgment *de novo*, and we accept all facts and inferences in the light most favorable to the non-moving party. *Pardo v. Hosier*, 946 F.2d 1278, 1280 (7th Cir. 1991) (citations omitted). Forbes raises four issues for review: whether genuine issues of material fact preclude summary judgment on (a) whether the urine test he was ordered to take was unreasonable, and thus violative of the Fourth and Fourteenth Amendments, and (b) whether the prison disciplinary proceedings violated due process; whether Indiana's failure to provide judicial review of disciplinary hearings violates due process; and whether the district court should have dismissed as moot Forbes' claim about his administrative segregation.

A. Administrative Segregation Claim

Forbes' challenge to his administration segregation is moot, and should have been dismissed by the district court. By the time Forbes filed his petition, he had been released from administrative segregation, and any request for less restrictive custody was therefore moot. *McCollum v. Miller*, 695 F.2d 1044, 1048 (7th Cir. 1982). Federal Rule of Civil Procedure 12(h)(3) provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Trigg concedes the issue. Appellee's Brief at 32. Therefore, we vacate the district court's ruling on Forbes' administrative segregation, and remand this issue to the district court for dismissal pursuant to the provisions of Fed. R. Civ. P. 12(h)(3).

B. Reasonableness of Urine Test

We cannot dispense with Forbes' other claims as easily. Forbes argues that the IYC's urine test was unreasonable and therefore violated the Fourth Amendment's strictures against unreasonable searches and seizures. We disagree. Forbes raises several challenges to the reasonableness of the IYC urine test. He argues that he was not given adequate prior notice that he was subject to the test, that Crider ordered the test of the Custody Building workers to harass him, and that the prison had no regulations governing the administration and processing of the tests, subjecting him to the risk of a false-positive test.

Urine tests are searches for Fourth Amendment purposes, and prison inmates retain protected privacy rights in their bodies, although these rights do not extend to their surroundings. *See e.g., Hudson v. Palmer*, 468 U.S. 517 (1984) (no privacy interest in prison cell); *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir. 1986) (urinanalysis is search for Fourth Amendment purposes). Moreover, for Fourth Amendment purposes, urinanalysis is analogous to body cavity searches and blood tests. *Tucker v. Dickey*, 613 F. Supp. 1124 (D.C. Wis. 1985) (urine sample analogous to blood test for Fourth Amendment purposes); *Storms v. Coughlin*, 600 F. Supp. 1214, 1220 (S.D.N.Y. 1984). In *Bell v. Wolfish*, the Supreme Court examined the constitutionality of post-visitation body cavity searches. 441 U.S. 520 (1970), and explained that the basic test for the constitutionality of a search that invades the integrity of an inmate's body is reasonableness.

> In each case [the Fourth Amendment] requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Wolfish, 441 U.S. at 559 (citations omitted). The Court stressed that prison administrators are accorded "wide-

ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547. Further, subsequent cases have noted that "[t]he unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country." *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir. 1986) (citing *Block v. Rutherford*, 468 U.S. 576, 588-89 (1984)).

Urinalysis testing is not a new issue in this (or any other) circuit. *See Draper v. City of Chicago*, 907 F.2d 152 (7th Cir. 1990) (police officers); *Taylor v. Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional officers); *Dunn v. White*, 880 F.2d 1188, 1192 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990) (AIDS testing of inmates); *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir. 1986) (inmates); *United States v. Williams*, 787 F.2d 1182 (7th Cir. 1986) (probationer); *Storms v. Coughlin*, 600 F. Supp. 1214, 1218-20 (S.D.N.Y. 1984) (urinalysis drug testing). In *Williams*, for example, we held that courts could order probationers to submit to periodic urinanalysis for narcotics as a condition of parole. 787 F.2d at 1185. We determined that it was reasonable to require (as a condition of parole) a probationer who tested positive for marijuana to submit to drug screening at the direction of his probation officer. *Id.* at 1186. In *Spence*, the Eighth Circuit considered and dismissed an action by inmates seeking to bar urine testing in prisons. 807 F.2d at 755. Noting that the widespread use of narcotics plagues penal institutions, the court found that urine testing is a reasonable means of combating the problem. *Id.*

Forbes does not contest that prison authorities may conduct urine tests; he complains about the way in which the IYC Custody Building test was administered. His first contention, that he did not have adequate notice of the testing requirement is without merit. Forbes does not contest that the IYC rule requiring all inmates working within the Custody Building to submit to urine tests was posted ten feet from his work station. Forbes also was

informed of the policy when he and his fellow inmates were taken to the prison hospital for testing. This rule had been in place months before Forbes was assigned to the Custody Building, and Sergeant Crider stated in his affidavit that he personally informed Forbes of the requirement before Forbes began working. Forbes' denial of this assertion does not create a genuine issue of material fact because of the posted rules. A prisoner cannot ignore posted rules, a verbal notice on the test day, and then assert that he lacked notice of the test.

Forbes relies on *Storms v. Coughlin*, 600 F. Supp. at 1221, for the proposition that any procedure that allowed IYC correctional officers to know whom they were going to test violates the Fourth Amendment. In *Coughlin*, however, the issue was whether a test that was supposed to be administered randomly was in fact random, because the prison official selecting inmates to be tested simply selected cards bearing their names from a bulletin board. *Id.* at 1223. The court explained that "[s]o long as [the official] is potentially aware of the name of the prisoner he is choosing the commander may, consciously or unconsciously, steer his choices toward less favored inmates." *Id.* The testing process at issue here, however, does not present the same concerns.

All inmates in the Custody Building were subject to periodic testing, the only question was when the test would be administered. We agree with Trigg that if the tests were performed on a schedule known to the inmates, the test's ability to detect illegal drug use would be reduced, if not eliminated. Crider has testified that the test was administered approximately every ninety days. Forbes asserts that the timing of the test was suspicious because it occurred only two days after he came to the Custody Building, and that Crider could have ordered all the inmates to be to be tested to cover up his harassment of Forbes. Appellant's Brief at 14 n.6. We reject these assertions.

Moreover, the Eighth Circuit has held in a similar case that, where a prisoner is given verbal orders, and advance

notice and "at least one chance to conform his conduct to the order before any disciplinary proceeding was commenced," the requirements of due process are satisfied. *Meis v. Gunter*, 906 F.2d 364, 367 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 682 (1991). In *Meis*, the inmate argued that his due process rights were violated because he was not given access to all administrative regulations, operational memoranda, and other documents that contain standards of conduct for inmates. *Id.* at 365. This argument is analogous to Forbes' demand that the IYC produce an inmate's written acknowledgement that he has received notice or copies of all rules which could be the subject of a correctional official's order before it can sanction the inmate for refusing to obey an order. *See* Appellant's Brief at 7, n.3. As the court in *Meis* explained, such fastidious notice procedures are not required in order for the prison to enforce its officers' verbal orders. *Id.* at 366. We agree with the warning in *Meis* that a total lack of notice and opportunity to comply with a rule could violate due process, but that scenario is not presented here. The example given by the court in *Meis* is enlightening:

> [if the prison] makes it an offense for an inmate to have in his cell more than three books, and if an inmate, not knowing of the [rule], has four books in his cell, and if an officer, upon discovering the four books, institutes disciplinary proceedings against the inmate without first informing him of the three-book limit and giving him a chance to get rid of the fourth book, obviously problems of due process arise.

Id. at 367. Despite Forbes' allegations, he has not been subject to this kind of draconian handling. *See Coffman v. Trickey*, 884 F.2d 1057 (8th Cir. 1989) (inmate punished for knowing violation of published rule when no rule existed), *cert. denied*, 494 U.S. 1056 (1990). Due process requires that inmates receive fair notice of a rule before they can be sanctioned for its violation. *Id.*

Again, we believe Forbes received fair notice. The undisputed facts show that the notice of the urine test requirement was posted ten feet from Forbes' work station,

Crider informed Forbes that he was subject to the test and the consequences of refusing the test or testing positive and gave him a chance to submit before he reported Forbes for refusing to obey his order. Forbes argues that *Taylor v. Perini*, 413 F. Supp. 189 (N.D. Ohio 1976) holds that posting is an insufficient form of notice of rules. But he neglects to point out that posting was insufficient in that case only "in view of the transitory effect of such postings." *Id.* at 235. There has been no allegation that the posting of rules in the Custody Building was temporary or transitory. In fact, the urine-testing requirement was in effect and posted from March 1990. Therefore, we find *Taylor* of limited assistance.

Further, the danger discussed in *Storms* and other cases is that posed by random drug tests that are not really random because prison officials choose which inmates will be tested. Correctional officials could harass particular inmates by subjecting them to repeated tests. In this case, the danger of this kind of harassment is illusory; all the inmates were tested. Forbes was not singled out by Crider—in fact, following Forbes' line of reasoning, Crider could not enforce any Custody Building rules against Forbes without raising the specter of harassment. We refuse to accept the supposition that a urine test of all inmates conducted at the same time, under the same conditions, could constitute harassment of one of the inmates.

Forbes also challenges the reasonableness of the urine test based upon the IYC's lack of published procedures for implementing and handling them. He says the lack of published procedures exposed him to the risk of a false positive result because of improper handling. *See* Appellant's Brief at 14. We reject this claim. The IYC is not required to publish the testing procedures it follows when it analyzes a specimen for narcotics. Of course the IYC must use scientifically sound testing procedures, *see, e.g.*, *Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986); *Wykoff v. Resig*, 613 F. Supp. 1504 (N.D. Ind. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1225 (S.D.N.Y. 1984), but an inmate cannot refuse to be tested simply because he

has not seen and approved the institution's testing protocol. We also point out that Forbes has not alleged that the means of collecting the samples was unnecessarily intrusive or harassing. *Cf. Tucker v. Dickey*, 613 F. Supp. 1124, 1126 (W.D. Wis. 1985) (inmate awakened at 5:00 a.m., handed bottle and copy of official statement, and ordered to produce specimen). Further, as the district court pointed out, if Forbes' concern is over the lack of a published schedule for the tests, there is no unfairness in the IYC's refusal to publish testing dates because concealing test dates from inmates is necessary in order for the tests to be useful detectors of illicit drug use. Further the ninety-day testing interval is not so frequent as to suggest harassment, and the testing of all inmates removes the danger that a particular inmate could be singled out and harassed. *Forbes v. Trigg*, No. IP 90-1931-C, slip op. at 9 (Mar. 18, 1991).

C. Adequacy of the Hearing Procedures

We now turn to Forbes' claim that his disciplinary hearing violated his due process rights. In evaluating constitutional claims of prisoners, we must balance the need to protect prisoners' procedural rights against the need for prison safety and security. *See Wolff v. McDonnell*, 418 U.S. 539, 556 (1973). We review procedural due process claims in two steps: we determine whether there was a deprivation or interference with a protected liberty or property interest, and then, whether the procedures attendant upon the deprivation or interference were constitutionally sufficient. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

In this case the parties do not contest that Forbes was deprived of a protected liberty interest—"good" or "credit" time. *See* IND. CODE ANN. § 35-50-6-3, -4 (Burns 1988); *Thompson*, 490 U.S. at 461; *Superintendent v. Hill*, 472 U.S. 445, 453-54 (1984) (outlining procedures inmate must receive where a prison disciplinary hearing may result in loss of good time credits); *Wolff v. McDonnell*, 418 U.S.

539, 561 (1973). *See also* Disciplinary Hearing Appeal, Response of Superintendent Trigg, Appellant's Appendix at 10 ("As this case does involve grievous loss, you may appeal to the final reviewing authority."). At issue, then, is whether the disciplinary proceeding which imposed the penalty (deprivation of 30 days credit time) provided constitutionally adequate procedures. In *Wolff v. McDonnell*, 418 U.S. 539, 556 (1973), the Court held that the strictures of due process imposed by the Fourteenth Amendment apply to prison disciplinary proceedings. Nevertheless,

> the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

Id. at 557. (citations omitted).

The Court outlined the procedural protections to which inmates are entitled in disciplinary proceedings. *Id.* at 566. They may call witnesses and present documentary evidence when it "will not be unduly hazardous to institutional safety or correctional goals." *Id.* Although "the right to present evidence is basic to a fair hearing . . . the unrestricted right to call witnesses from the prison population carries the obvious potential for disruption." *Id.* The Court emphasized that prison officials retain "the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority . . . ." *Id.*

The IDOC rule allowing correctional officials complete discretion to appear at disciplinary hearings is analogous to the policy rejected in *Ponte v. Real*, 471 U.S. 491, 495 (1984), where prison officials argued that no reason need be given for refusing to call a witness. The Court disagreed.

> [T]o hold that the Due Process Clause confers a circumscribed right on the inmate to call witnesses at a disciplinary hearing, and then conclude that no explanation need ever be vouched for the denial of that right, either in the disciplinary proceeding itself or if that proceeding be later challenged in court, would change an admittedly circumscribed right into a privilege conferred in the unreviewable discretion of the disciplinary board.

Real, 471 U.S. at 498. Before *Real*, the Fourth Circuit held that a prison policy that provided that an inmate has only the right to present "voluntary" witnesses (either inmates or correctional personnel, or others) at a disciplinary hearing, violated the prisoner's due process rights. *Dalton v. Hutton*, 713 F.2d 75, 78 (4th Cir. 1983). In *Dalton*, the inmate was accused of inciting to riot or rioting. In his defense, the inmate asked two prison officers to serve as witnesses. Both declined; one gave no reason, the other stated that because of prior charges he made against the inmate he would not testify. *Id.* at 76. At the inmate's hearing only the officer charging him with the offense testified, and the inmate denied the charge. The inmate was sentenced to isolation and lost all accumulated good time. *Id.* at 77.

The court explained that the right of an inmate to call witnesses remains a part of the "substantive foundation of procedural Due Process for inmates." *Id.* (citing *Bartholomew v. Watson*, 665 F.2d 915, 918 (9th Cir. 1982)). Like Respondent here, the Virginia prison officials argued that it is only the witness's refusal to testify that affected the inmate's rights, not the prison rule itself. The court rejected this argument:

> We conclude that it is just such a restriction to unrestrained "voluntariness" that exceeds the boundaries of constitutional fairness. One needs no "right" to call a witness who voluntarily presents himself. If there is preclusion of an entire class of witnesses (i.e., anyone who would rather not appear), the right is dis-

> sipated in a cloud of verbiage. An inmate granted the right, albeit qualified, to call witnesses in his behalf loses it altogether, if any witness may refuse to testify for no reason whatever. . . . Even if such restrictions are valid as applied (e.g. testimony unduly hazardous to the witness, institutional safety or correctional goals), *per se* proscriptions against the calling of certain categories of witnesses are violative of the Supreme Court's admonition that "the decision to preclude the calling of witnesses should be made on a case-by-case analysis of the potential hazards which may flow from the calling of a particular person."

Id. at 78 (quoting *Bartholomew*, 665 F.2d at 918). The court found the regulation that permitted only voluntary witnesses was equivalent to no regulation, and that its failure to require a case-by-case analysis of the calling of involuntary witnesses violated the tenets of *Wolff*. Witnesses are "especially critical" in the prison context, the court found, because the inmate begins with a credibility problem. *Id.* Constitutional policy demands that disciplinary committees encourage staff and residents to appear when asked to do so. *Id.*

We find the Fourth Circuit's reasoning persuasive. Other circuits have also relied upon *Dalton* in holding that rules which categorically bar certain classes of witnesses are unconstitutional. For example, in *Ramer v. Kerby*, 936 F.2d 1102, 1104 (10th Cir. 1991), the court reviewed a prison policy that required prisoners to submit written questions for prospective staff-member witnesses. If the disciplinary committee chairperson found the questions relevant, the chairperson contacted the staff member for a written response. Ramer, the inmate, refused to submit questions. The court noted the Supreme Court's suggestion that "it would be useful for the Committee to state its reasons for refusing to call a witness, whether it be for irrelevance, lack of necessity, or *the hazards presented in individual cases*." *Id.* at 1104 (citing *Wolff*, 418 U.S. at 566) (alteration in original). *Ramer* echoed *Dalton*'s finding that this language has been interpreted

to require that prison officials determine on a case-by-case basis whether permitting an inmate to call or confront a particular witness would threaten institutional safety or correctional goals. *Id. See King v. Wells*, 760 F.2d 89, 93 (6th Cir. 1985) ("*Wolff* requires that officials make an individualized decision on the facts of each case."); *Bartholomew v. Watson*, 665 F.2d 915, 918 (9th Cir. 1982) (holding unconstitutional policy prohibiting inmates from calling staff members as witnesses without proof of facts establishing threat to institutional safety).

In *Ramer*, the Tenth Circuit found the policy prohibiting prisoners from calling staff members as witnesses deprives inmates of the process due in a prison disciplinary proceeding. 936 F.2d at 1104. The court reaffirmed that prison officials must decide on a case-by-case basis "whether legitimate penological concerns including, but not limited to, safety or correctional goals, expense, staffing requirements throughout the institution, and the danger of harassment, counsel against permitting the requested staff members to appear at the hearing." *Id.*

Similarly, in *Hayes v. Walker*, 555 F.2d 625, 629 (7th Cir.), *cert. denied*, 434 U.S. 959 (1977), this court noted that "due process does not permit the automatic exclusion of the right to call witnesses." We explained in *Hayes* that some support for a denial of a request for witnesses must appear in the record in order to prevent arbitrary denials of a prisoner's right to call witnesses which would render the right meaningless. *Id.* at 630.

We believe these cases are dispositive. IDOC's rule that allows inmates and staff members to refuse to testify at disciplinary hearings without explanation violates the Due Process Clause of the Fourteenth Amendment. If the rule incorporated a determination by the disciplinary committee that the factors that excuse testimony set forth in IND. CODE ANN. § 11-11-5-5 (5) (Burns 1988) have been satisfied, the rule would be constitutional. Section 11-11-5-5 (5) outlines acceptable reasons to refuse to allow a requested witness. The Constitution requires that a determination

be made on a case-by-case basis that requested witnesses pose institutional problems. *Wolff*, 418 U.S. at 506. Again, we acknowledge that the "inmate's right to present witnesses is necessarily circumscribed by the penological need to provide swift discipline in individual cases . . . [and] by the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff." *Ponte v. Real*, 471 U.S. 491, 495 (1984) (citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976)).

The IDOC rule eviscerates the inmate's right to present witnesses. It vests unreviewable discretion to appear in correctional officials (like the charging officer) and other inmates who may have played significant roles in an inmate's disciplinary charge and punishment. Therefore, we hold that the rule that permits correctional officials and inmates to refuse to appear at whim is unconstitutional, and encourage the Indiana Department of Corrections to enact a new rule consistent with the provisions of IND. CODE ANN. § 11-11-5-5 (5) (Burns 1988) and this opinion.

Notwithstanding the infirmities of IDOC rule, we do not believe that as applied to Forbes, it violates his due process rights, or that he is entitled to a new hearing. *See Dalton*, 713 F.2d at 78. The Indiana statute provides that irrelevant or repetitive testimony need not be admitted. IND. CODE ANN. § 11-11-5-5 (5), (6)(C). In this case, Forbes was disciplined for failing to follow Crider's order. Forbes presumably wished to call Trigg and Major Alexander to question them about the urine-testing policy. But the CAB was not required to reevaluate the test, only to verify that the rule existed, had been posted, and that Crider informed Forbes of the rule before he charged him with refusing to obey his order. The existence of the rules and their provisions could be verified by documentary evidence, rendering any testimony from Trigg and Alexander repetitive, and unnecessary under the statute. Because the test was reasonable, there was no evidence Forbes could present to justify his refusal to follow Crider's order. He did not dispute that he refused to follow the order, only that he was not required to submit to the test.

In any other context, where the underlying facts of the charged misconduct are in issue, the testimony of the charging officer would be relevant (and perhaps indispensable), and prison officials would have to offer some penological justification (such as those outlined in the Indiana statute) for refusing to call such a witness. As to the other requested witnesses, Trigg and Alexander, we believe the district court was correct in finding that Due Process did not require their presence. Their testimony could have added little. Requiring high-ranking correctional officials who are not involved in the charged conduct to testify presents the danger that inmates might abuse the opportunity, disrupting the institution and undermining those officials' authority. *Wolff*, 418 U.S.at 566; *Ramer*, 936 F.2d at 1134. Although we are not entirely comfortable with this inquiry given the procedural context of this case, we do not believe genuine issues of material fact bar our judgment. Even given the benefit of all reasonable inferences, we do not believe on these facts, that the denial of witnesses violated Forbes' due process rights.

Forbes' other challenges to the administrative proceedings merit less discussion. He contends that the written record prepared by the CAB was inadequate and that he was not accorded meaningful administrative review. In *Wolff v. McDonnell*, 418 U.S. 539, 564-65 (1974), the Court held that "there must be a written statement by the fact-finders as to the evidence relied on and the reasons for the disciplinary action." *See also Pardo v. Hosier*, 946 F.2d 1278, 1284 (7th Cir. 1991); *Culbert v. Young*, 834 F.2d 624 (7th Cir. 1987), *cert. denied*, 485 U.S. 990 (1988); *Saenz v. Young*, 811 F.2d 1172 (7th Cir. 1987); *Hayes v. Walker*, 555 F.2d 625, 621-633 (7th Cir. 1977); *Jackson v. O'Leary*, No. 89-C-7383, 1992 U.S. Dist. LEXIS 2108, at *11 (N.D. Ill. Feb. 24, 1992). *Compare Brown v. Frey*, 807 F.2d 1407, 1413 (8th Cir. 1986) (requiring less in written statement than *Hayes* and *King*). In this case, the CAB provided the following written statement:

> CAB [c]onsidered Conduct Report, offender[']s plea and testimony, the findings [a]re, by Forbes #853165 own admission did Refuse an order on 8-15-90, when Sgt. Crider gave offender Forbes #853165 an order to submitt [sic] to a urine specimen, Forbes Refused to submitt [sic] the urine specimen, as Reported by Credible Sgt. Crider, found Guilty.

Disciplinary Hearing Report, Appellant's Appendix at 9. In *Pardo*, we approved two written statements that were as limited, if not more so, than the one issued by the CAB following Forbes' hearing:

> [B]ased on resident's statements and officer's report the committee is convinced resident violated AR 804 by cursing, making improper and disrespectful remarks to an employee and thereby causing a general disturbance.
>
> [B]ased on resident's statements and officer's report the committee is convinced resident violated AR 804 by cursing, making improper and disrespectful remarks to an employee and thereby causing a disturbance.

Pardo, 946 F.2d at 1284. We also have approved a summary that stated only, "Officer Fabry's written statement supports the finding of guilt that an attempt was made by Inmate Saenz to commit battery upon the [other] inmate." *Saenz*, 811 F.2d at 1173-74. *See also Culbert v. Young*, 834 F.2d 624, 627 (7th Cir. 1987) (approving similar statement). In this case, the CAB was not required to reevaluate the constitutionality of the Custody Building urine-testing policy in order to find that Forbes refused to obey Crider's order. Any other rule would require the CAB to reevaluate the policy every time an inmate tested positive or refused the test. The CAB's statement "furnishes to the inmate both the grounds for the decision and the essential facts upon which the inferences are based," *Hayes v. Walker*, 555 F.2d 625, 632 (7th Cir. 1977), and thus is constitutionally sufficient.

Forbes' challenges the adequacy of the Department of Corrections' administrative review of the CAB's holding are also without merit. He relies upon *Smith v. Stoner*, 594 F. Supp. 1091 (N.D. Ind. 1984), for the proposition that administrative review must be meaningful, and not "merely pro forma." *Id.* at 1110. *Smith* is correct, but the facts in that case are a far cry from those presented here. In *Smith*, the CAB provided no written statement explaining the sanctions imposed or the reasons for their imposition, and the reviewing official examined only the notices of the violations, witness statements on charges that were dismissed, and prison disciplinary forms with a box marked guilty. *Id.* at 1101. Moreover, the reviewing officer did not review the substance of the CAB's finding, but only looked to see that the steps of the disciplinary procedure were timely. *Id.* at 1110. Such "review" is obviously constitutionally inadequate.

In contrast to the procedures afforded the inmate in *Smith*, Forbes' claims were substantively reviewed by two administrative officers. Superintendent Trigg reviewed and rejected Forbes' appeal on September 14, 1990 (Disciplinary Hearing Appeal, Appellant's Appendix at 10). Forbes asserts that Trigg's review was meaningless because he approved the CAB's action before Forbes lodged his appeal. This assertion misapprehends IDOC Disciplinary Policy procedures. In an uncontested affidavit, Trigg explained that as Superintendent of the IYC, he reviews all the CAB's guilty findings. Notwithstanding this review, Trigg has granted appeals of CAB rulings. *See* Trigg Affidavit at 3, Appellant's Appendix at 4.

John Nunn, Deputy Commissioner of IDOC reviewed and denied Forbes' appeal on October 2, 1990. Before ruling on Forbes' appeal, he verified that the rules requiring Custody Building workers to submit to urine tests were posted in the Building. *See* Memorandum from Paul O'Haver to John Nunn, dated 8/23/90, Appellant's Appendix at 12. Nunn wrote to Forbes twice—first, on August 27, 1990, explaining that a formal IDOC policy was not required before Custody Building employees could be tested for

drugs. *See* Appellant's Appendix at 12. He wrote to Forbes again on October 2, 1990, denying Forbes' appeal. There is no indication that this administrative review was not substantive or meaningful. Further, Forbes' contention that because these officers used language similar to that used in other administrative rulings, they failed to consider his claims, is without merit. *See* Appellant's Brief at 25. Simply because an administrative officer relies to some degree on boilerplate language in dismissing appeals does not mean that the review was not meaningful. In fact, Trigg's affidavit reveals that there are approximately 300 cases heard by the CAB each month. Of these, about 60 result in findings of not guilty. Trigg Affidavit at 3, Appellant's Exhibit at 4. Given the volume of cases, the Constitution does not require the CAB or its reviewing officers to come up with hundreds of unique ways of saying "you lose" each month. Meaningful review does not require creative writing. In fact, this court relies on boilerplate in certain contexts, such as dismissing appeals for lack of jurisdiction and denying petitions for rehearing. We doubt that Forbes would suggest that because of the boilerplate, parties before this court were denied "meaningful" review. Forbes has failed to present evidence that the IDOC's administrative review was constitutionally inadequate, and we dismiss this claim.

D. State Judicial Review

Finally, Forbes argues that the Fourteenth Amendment requires Indiana to provide judicial review of state prisoners' federal constitutional claims. The Indiana Supreme Court has held that Indiana courts do not have jurisdiction to hear such claims. *See Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988); *Bates v. State*, 426 N.E.2d 404 (Ind. 1981); *Riner v. Raines*, 409 N.E.2d 575 (1980). The United States Supreme Court has twice granted certiorari on the question of whether the Due Process Clause requires state judicial review of federal constitutional claims. *See Superintendent v. Hill*, 472 U.S. 445 (1984); *Case v. Nebraska*, 381 U.S. 336 (1964). In both cases, the Court declined to

decide the issue. We also decline. Although this is a significant question, and some state courts and at least one district court have reviewed it, *see, e.g., Richardson v. Miller*, 716 F. Supp. 1246, 1257-60 (W.D. Mo. 1989) (thoroughly reviewing issue); *Prock v. District Court of Pittsburg County*, 630 P.2d 772 (Okla. 1981), we do not believe we should decide this issue in a case where a prisoner has been accorded a judicial forum, albeit a federal one, in which to raise his claims. We also note that our decisions in *Miller v. Duckworth*, 963 F.2d 1002 (7th Cir. 1992), and *Harris v. Duckworth*, 909 F.2d 1057, 1058 (7th Cir. 1990), bind our decision on this claim. Thus we leave further resolution of this issue for the Supreme Court, if that Court chooses to address it.

III. Conclusion

For the foregoing reasons, we VACATE the district court's ruling on Forbes' administrative segregation, and remand this issue for dismissal pursuant to the provisions of Fed. R. Civ. P. 12(h)(3); we AFFIRM the district court's judgment on the remaining claims, but find the IDOC rule that provides that offenders (inmates) and staff requested to serve as witnesses in disciplinary hearings are not required to appear and testify (IDOC Adult Disciplinary Policy at 22, Appellant's Appendix at 6), is unconstitutional, and encourage the IDOC to enact a rule in conformity with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY KEOWN FORBES,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
CLARENCE TRIGG, Superintendent,	)	CAUSE NO. IP 90-1931-C
	)	
Respondent.	)	

ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DIRECTING ENTRY OF JUDGMENT

This cause is before the Court on the petition of Jerry Keown Forbes for a writ of habeas corpus, on the respondent's return to show cause and motion to dismiss or for summary judgment and on the petitioner's traverse.

Whereupon the Court, having read and examined such petition, return and motion and traverse, and being duly advised, now finds that the petitioner is not in custody pursuant to the judgment of a state court in violation of the Constitution or laws of the United States and that he is therefore not entitled to a writ of habeas corpus as prayed for in this action. This cause of action should accordingly be dismissed with prejudice and that judgment consistent with this entry shall now issue.

IT IS SO ORDERED.

/s/ LARRY J. McKINNEY, Judge
United States District Court

Date: March 18, 1991

MEMORANDUM

Background

Petitioner Jerry Keown Forbes is an inmate at the Indiana Youth Center (IYC). On August 7, 1990 he was assigned to work in the Officer's Barber Shop in the Custody Building and was so assigned on August 15, 1990. Offenders in the Custody Building have opportunities to traffic in contraband with visitors and others from outside the institution. Because of the threat to security and to the orderly operation of the IYC posed by the potential for such trafficking the IYC established criteria for inmate work assignment to the Custody Building. These criteria were published in a bulletin issued by then-Superintendent Clarence E. Trigg on December 15, 1989. One of the criterion is the following:

> VII. Offenders assigned to the Custody Building are subject to a urine drop.

The bulletin containing the criteria, including the above criterion, was posted in the Custody Building prior to Forbes' assignment to the Barber Shop. In addition, on March 23, 1990 Superintendent Trigg approved and issued a document entitled "Rules & Regulations Governing Offenders Working in the I.Y.C. Officer's Barber Shop in the Custody Building." This document was posted in the Barber Shop near Forbes' assigned work station. One of the "Rules and Regulations" prescribed in this two-page written document is the following:

> Offenders assigned to the Officer's Barber Shop are subject to a urine test as per criteria for this assignment.

The parties do not dispute the foregoing, which amounts merely to the fact that offenders assigned to the Barber Shop in the Custody Building were subject to a urine test.

Forbes' assignment to the Barber Shop did not become effective until August 11, 1990 and he started work on August 13, 1990.

Approximately every 90 days offenders assigned to the Custody Building are required to submit to a urine test, although there is no set schedule. On August 15, 1990 Correctional Sergeant Clinton Crider was responsible for the supervision of all offenders in the Custody Building, one of which was petitioner Forbes. On that date he ordered all (inmate) workers under his supervision to submit to a urine test.

At approximately 9:40 a.m. on August 15, 1990 Forbes was at the IYC hospital for a urine test. Sgt. Crider ordered him to submit to the test and Forbes refused. The order, the date and the refusal are not contested in this action. Upon Forbes' refusal, Sgt. Crider issued a conduct report charging Forbes with "Refusing to obey an order from any Staff Member." This Conduct Report was identified as IYC-90-08-177. Omitting formal portions, the text of the Conduct Report reads as follows:

> On Wednesday August 15, 1990 while in the I.Y.C. Hospital Lab, I Sgt. C. Crider at approximately 9:40 a.m. ordered offender Forbes #853165 to submit to a Urine Test as is part of the Criteria for working in the Custody Building. Offender Forbes refused and stated: "It isn't against the rules to be a drug addict". At this time offender Forbes #853165 was advised of this report and placed on hold pending CAB.
>
> Prior to ordering offender Forbes to submit to a Urine Test, I did advise him (Forbes) of the consequences of either taking the test and it coming back positive and receiving a Class B charge, or refusing the test and receiving a Class C charge, and of-

> fender Forbes did state that he was in understanding of two charges and consequences. Offender Forbes #853165 did sign a Medical Refusal Form.

The "Health Care Services Refusal Form" which Forbes signs confirms his refusal and contains his comment as "Reason given for refusal":

> It is not against the law or rules of IYC to be a drug addict; there is no IYC policy; there is no Probable Cause.

On August 3, 1990 Forbes acknowledged in writing receiving a copy of documents entitled "Adult Disciplinary Policy Procedures" (1990) of the Indiana Department of Correction and "Indiana Youth Center Rules and Regulations" (Revised 1989). Section XXII of the IYC Rules and Regulations, found on page 69, states:

> *Do what you are told* to do by any staff member. If you feel the order is unjust, *you may request to talk to a staff member* about it *after you have done as instructed.*

(emphasis in original). The "Adult Disciplinary Policy Procedures" booklet contains a description of the disciplinary structure for misconduct within an institution and identifies various coded "offenses" for which discipline may be imposed. Offense 347 consists of "Refusing to obey an order from any staff member." This is classified as a "Class C" offense, for which sanctions may be imposed of three months in disciplinary segregation, a one grade reduction in credit class, up to three months' loss of credit time, the loss of privileges and assignment of extra work.

A disciplinary hearing was held on August 21, 1990 by a

conduct adjustment board (C.A.B.). Forbes had requested the presence of three IYC staff members, including the superintendent. Each refused to appear. At that proceeding Forbes' statement, reduced to writing, was that:

> I did refuse to give the urine specimen. Nobody advised me of being subject to a urine drop. You just can't pick somebody at random for a urine test. You are all going to lose. See attached—I don't feel I had to take a urine drop, other than Sgt. Crider harass[] me.

Forbes was found guilty. The C.A.B.'s "Finding of fact and evidence relied upon" was the following:

> CAB considered Conduct Report, Offender's plea & testimony, the findings are, by Forbes #853165 own admission did refuse an order on 8-15-90, when Sgt. Crider gave offender Forbes #853165 an order to submit to a urine specimen. Forbes refused to submit the urine specimen, as Reported be Credible Sgt. Crider, found Guilty.

As a result of this finding Forbes was sanctioned with a change in his work assignment and with the loss of thirty (30) days credit time. His subsequent administrative appeals within the Department of Correction were unsuccessful.

Following the C.A.B. hearing Forbes was placed in segregation because of threats of bodily injury against Sergeant Crider and Sergeant Lacey. Forbes remained in segregation until 1:00 p.m. on August 24, 1990. His placement in segregation was to permit him to "cool down," was not for punitive reasons and did not result in a formal charge of misconduct. This placement was ordered by Lt. Harley Crabb, who was also the chairman of the C.A.B.

Issues

This action for habeas corpus relief is premised on a medley of asserted violations of Forbes' Due Process rights under the Fourteenth Amendment:

1) He is entitled to judicial review of prison disciplinary proceedings in the courts of Indiana;
2) He was not afforded adequate notice that his conduct in prison was prohibited;
3) Prison officials acted arbitrarily, and for purposes of harassment, enforce unwritten or "utterly vague" rules;
4) He was denied the right to call witnesses at the disciplinary hearing;
5) He was deprived of the right to confront and cross-examine witnesses at the hearing;
6) He was denied the right to pursue a meaningful administrative review of the CAB hearing when the IYC Superintendent affirmed the CAB's action before his time for appeal had expired;
7) He was deprived his right to an adequate record of the events at the hearing;
8) He was subjected to disciplinary action without "reasonable suspicion" or probable cause;
9) He was placed in "Administrative Segregation" without a hearing or being afforded an opportunity to be heard.

The respondent has addressed these claims with various documents related to the C.A.B. proceeding. The petitioner has filed a traverse, also supported by various documents, and the matter has been fully at issue since December 21, 1990.

Discussion

The Court recognizes that a state inmate has certain procedural protections mandated by the Due Process Clause in connection with prison disciplinary proceedings. *Wolff v. McDonnell,* 94 S.Ct. 2963 (1974). These are, essentially, notice of the allegations, an opportunity to be heard and to present witnesses and adjudication by a neutral committee that put its findings on the record. *McKinney v. Meese,* 831 F.2d 728, 733 (7th Cir. 1987). However, once a prisoner has been granted those procedural protections the role of a reviewing court "is limited to determining whether there was sufficient evidence to support the committee's decision." *Id.* Such decision is constitutionally valid if there is "any evidence in the record that could support the conclusion reached by the disciplinary board." *Superintendent, Mass. Correctional Institution v. Hill,* 105 S.Ct. 2768, 2774 (1985). With these principles in mind, the specific challenges Forbes presents to the disciplinary proceeding will be considered.

Right to judicial review. Forbes' first claim is that, as a matter of law, he has been denied due process because the courts of Indiana refuse to consider due process challenges to prison disciplinary challenges. His first claim also fails as a matter of law because due process is not always judicial process. *Garvey v. Freeman* , 397 F.2d 600, 612 (10th Cir. 1968). He cites no authority for the proposition that a state is *compelled* under the Due Process Clause to permit challenges such he presents here. Indiana has chosen not to entertain such challenges. *Hasty v. Broglin*, 531 N.E.2d 200 (Ind. 1988). However, the only effect of this is to demonstrate "the absence of available State corrective process . . . to protect the rights of the prisoner," 28 U.S.C. § 2254(b), and thereby permit a habeas corpus challenge such as Forbes now presents to be brought without first exhausting (nonexistent) "state remedies." *Harris v. Duckworth*, 909 F.2d 1057 (7th Cir. 1990).

Notice of Prohibited Conduct. Forbes maintains that he was unaware of being subject to a urine test because of his work assignment in the Officer's Barber Shop. Whether he had *actual notice* of the rule is disputed, but he does not dispute that the rule exists or that it was posted on a bulletin board in the Barber Shop. He also does not dispute his receipt of the Department of Correction pamphlet making it a Class C disciplinary offense to "Refus[e] to obey an order from any staff member." Additionally, he does not dispute that, before actually refusing the order, he was verbally informed of the rule by Sgt. Crider.

While Forbes pours much effort into this claim, making it the centerpiece of his action, it is a sham. He states on page 2 of his Traverse that he was not "on notice" of the requirement concerning the urine testing. The Court will accept as true his statement that he did not have actual notice of this criterion for work assignment in the Barber Shop or Custody Building.

Due process requires that "within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 318 (1950). The notice in this case was more than sufficient. Forbes knew (through his receipt of the "Adult Disciplinary Policy Procedures" booklet) that he was required to obey the orders of staff members and that he would be subject to discipline if he did not. In terms of the particular criteria for assignment to the Barber Shop or Custody Building, the publication (through posting on a bulletin board) of those criteria constituted "fair" notice to Forbes. Lastly, after the order was issued, a discussion ensued between Sgt. Crider and Forbes in which the requirement was specifically communicated to Forbes. He thus had a "last chance" to conform his conduct to each of the rules to which he was subject but chose not to do so. No more meaningful notice can be imagined.

This is not contrary to published decisions which have addressed similar concerns. *In Meis v. Gunter,* 906 F.2d 364 (8th Cir. 1990), the Court held that the inmate was entitled to "fair notice" of what was prohibited but that he had received it, despite the abstract possibility that he could have been directed to do something which he had not previously known he could be obligated to do. In that case, as here, the lack of actual advance knowledge was mitigated by the inmate being given at least one chance to conform his conduct to the order before any disciplinary action was commenced. *Id.*, 906 F.2d at 367. In *McMillan v. Healey,* 739 F.Supp. 153, 156 (S.D.N.Y. 1990), the Court concluded that due process does not prohibit the imposition of punishment unless the inmate was made aware of the potential penalties prior to the charged misconduct.

The law is replete with phrases such as ignorance of the law does not serve as an excuse for criminal conduct. In *Lambert v. California,* 355 U.S. 225, 228 (1957), the Supreme Court recognized:

> There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.... The rule that "ignorance of the law will not excuse" ... is deep in our law ...." (citations omitted).

This principle has been relied on recently in the criminal context to uphold the rule that due process does not require the prosecution to prove that a drug trafficker had actual knowledge of the proximity of a school to a drug transaction before being subject to enhanced penalty under 21 U.S.C. § 854a. *United Sates of America v. Vasarajs,* 908 F.2d 443 (9th Cir. 1990); *United States v. Ofarril,* 779 F.2d 791, 792 (2d Cir. 1985) (per curiam), *cert. denied,* 106 S.Ct. 1231 (1986). Used in the criminal context, where culpability for misbehavior is governed by stringent standards, this principle supports a conclusion here that the due process concerns which Forbes asserts are little more than vapor.

Wolff requires that a prisoner receive a written notice of charges "in order to inform him of the charges and to enable him to marshall the facts and prepare a defense." 418 U.S. at 554. There is no doubt here that by the time the Conduct Report was issued, and likewise at the time of the C.A.B. hearing, Forbes had actual knowledge of all of the rules which were implicated by his failure to obey Sgt. Crider's order. This was notice. It was notice of the charge and of the details of the alleged rule violation. It is all that due process required in the context of a prison disciplinary proceeding.

Vague Rules/Arbitrary Enforcement. Forbes contends that the urine drop rule was enforced arbitrarily and for purposes of harassment. This is refuted by the expanded record in this action. The enforcement of a rule of this nature would lose its meaning if offenders knew of a particular schedule for testing. If the "unwritten rule" reference in this claim is to the details of when testing will be scheduled, this Court finds no unfairness suggested by it. The interval selected for testing—every ninety (90) days—is not so frequent as to suggest harassment. On August 21, 1990, moreover, *all* inmate workers in the Custody Building were given the same order as was Forbes. This is contrary to the suggestion that he was being arbitrarily or maliciously singled out for enforcement of the rule.

Calling, Confronting and Cross-examining Witnesses. Forbes next contends that Indiana law assures him of the right to call, confront and cross-examine witnesses,

> unless the person conducting the hearing finds that to do so would subject a witness to a substantial risk of harm, result in the admission of irrelevant or repetitive testimony, or based upon good cause stated on the record, a witness is unavailable to attend the hearing.

The statute concerning this subject is Ind. Code 11-11-5-5 and provides in part:

> (a) Before imposing any disciplinary action, the department shall afford the person charged with misconduct a hearing to determine his guilt or innocence and, if guilty, the appropriate action.... In connection with the hearing, the person is entitled to:
>
> . . .
>
> (5) Call witnesses and present evidence unless the person conducting the hearing finds that to do so would subject a witness to a substantial risk of harm, or would result in the admission of irrelevant or repetitive testimony;
>
> (6) Confront and cross-examine witnesses, unless the person conducting the hearing finds:
>
> (A) That to do so would subject a witness to a substantial risk of harm;
>
> (B) That to do so would result in the admission of irrelevant or repetitive testimony; or
>
> (C) Based upon good cause stated on the record, that a witness is unavailable to attend the hearing.

The Court does not find this portion of the Indiana statute to confer any broader or greater rights than found in *Wolff* and thus does not consider it as a potential separate source of a due process interest in this matter.

Under *Wolff*, prisoners are entitled to marshal their defenses by calling witnesses. 418 U.S. at 566. The scope of this right, however, is limited by the special requirements of the prison setting. "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." *Id.* at 566. The scope of a prisoner's right to confront and cross-examine witnesses is similarly committed to the sound discretion of prison officials. *Id.* at 569.

Forbes requested the presence of three staff members at his hearing. These were Superintendent Trigg, Sgt. Crider and Major Alexander. This latter person is described in the respondent's return as the highest ranking uniformed officer at the IYC. All three staff members refused to appear as witnesses and the C.A.B. did not compel their attendance.

The dispositive aspect of this claim is that Superintendent Trigg and Major Alexander were evidently not present at the time of the alleged misconduct, played no personal role in initiating or handling the Conduct Report and had no personal knowledge of the incident. Forbes made no suggestion in his administrative appeal and makes no claim here that the testimony of the requested witnesses would or could have contributed to his ability to present a meaningful defense. The existence of the IYC rules was clear enough. The petitioner's lack of actual "advance" knowledge of the urine test was not disputed by the C.A.B. In identifying the safeguards due process requires in this context, courts should remember "the legitimate institutional needs of assuring the safety of inmates and prisoners" and avoid "burdensome administrative requirements that might be susceptible to manipulation." *Hill,* 472 U.S. at 454-55. That is precisely the flavor of Forbes' request for witnesses in this instance and it was not unreasonable for the C.A.B. to compel them to appear to provide what remains only speculative information regarding his alleged misconduct. Its action in this respect was not arbitrary and did not deprive Forbes of any recognized due process right in this setting.

Administrative Appeal. The petitioner's claim regarding his administrative appeal is something of a mystery. The claim itself is expressed in paragraph 12a(6) of his petition:

> Petitioner was denied the right to pursue a meaningful administrative review of the decision of the prison disciplinary committee by the act of the Superintendent, the first reviewing authority, af-

> firming the action of the Conduct Adjustment Board ("CAB"), before Petitioner's time for appeal expired.

Some light is shed on this mystery by understanding the institution head's dual role in disciplinary actions. Superintendent Trigg's affidavit explains:

> 13. Under the Adult Disciplinary Policy Procedures of the Indiana Department of Correction, all findings of guilty by the Conduct Adjustment Board are sent to the Superintendent for review.
> 14. This does not preclude me as Superintendent from considering appeals or from granting relief through an appeal if the offender presents sufficient reasons for doing so.
> 15. As Superintendent of the Indiana Youth Center, I have granted appeals in disciplinary case[s], resulting in the sanctions being reduced, dismissal of the case entirely and its expungement from the offender's record, or reducing a sanction from formal to informal, which results in expungement from the offender's record, even though I initially reviewed the finding of guilty by the Board.

The petitioner has not addressed this explanation in his traverse and the Court therefore accepts it as true. 28 U.S.C. § 2248.

Here, Superintendent Trigg "reviewed" the C.A.B. action and upon his approval it became final, subject to Forbes' appeal (and subsequent challenge such as that brought here). This was not an isolated intervention into the normal process to sabotage Forbes' ability to appeal the C.A.B. decision, but was instead a part of the normal process which actually provides another safeguard in the entire context of prison disciplinary proceedings. In addition, the Court notes that the petitioner's Traverse includes a copy of his appeal to Superintendent Trigg and the Superintendent's response.

The response was meaningful, and in any event further administrative layers were available to the petitioner if the institution head's role in the appeal process had in fact become "tainted" by his previous, but routine, review of the C.A.B. finding.

Inadequate Record. Forbes contends that the C.A.B. hearing was lengthy, that the notations on the form were brief and, in one respect inaccurate. His argument shifts somewhat from his petition to his Traverse, but neither version warrants relief.

In his petition, paragraph 12a(7), Forbes alleges that he was deprived of his right to an adequate record of the events at the C.A.B. hearing by the failure to the C.A.B. to "record his request for witnesses, statements in mitigation, and other issues identified or statements" made by him "or to employ any procedure which would permit such a record to be made." The meaning of this claim is not entirely clear, although the due process right concerning the creation of a reviewable record is.

The Supreme Court held in *Wolff v. McDonnell*, 94 S.Ct. 2963 (1974), that one of the due process protections applicable to a prison disciplinary action is that there be "a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." The requirement of a written record protects the inmate against collateral consequences based on a misunderstanding of the initial decision. It also helps insure that prison administrators act fairly. *Id.* In *Culbert v. Young*, 834 F.2d 624 (7th Cir.1987), the plaintiff, an inmate in a Wisconsin prison, argued that the prison disciplinary committee failed to provide him with an adequate statement of the evidentiary basis for the discipline action taken against him. The Court's discussion is instructive on the claim which the plaintiff presents here:

This court has also reaffirmed that the written requirement is necessary to determine whether the committee's decision is "based on substantial evidence or whether the decision [is] sufficiently arbitrary so as to be a denial of due process." *Aikens v. Lash,* 514 F.2d 55, 60-61 (7th Cir. 1975), *vacated on other grounds,* 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976). The *Aikens* court found this consideration to be a natural corollary to the Supreme Court's concern in *Wolff* for procedural protections, arguing that the Court could not have contemplated that the procedural rights it was enunciating could "be easily emasculated by allowing prison officials to infringe arbitrarily on an inmate's substantive due process right not to be found guilty except by an appropriate quantum of evidence." *Id.* 514 F.2d at 60. Since this court decided the *Aikens case,* however, the Supreme Court has had the opportunity to consider what quantum of evidence is constitutionally required in prison disciplinary proceedings. *See Superintendent, Mass. Correctional Institution v. Hill,* 472 U.S. 445, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985). In *Hill,* the Court declined to adopt a more stringent evidentiary standard than "a modicum of evidence" as a constitutional requirement. *Id.,* at 455-56, 105 S.Ct. at 2774-75. Instead, the Court held that "the relevant question is whether there is *any* evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* (emphasis supplied). Furthermore, the Court noted that "[a]scertaining whether this standard is satisfied does not require assessment of the credibility of witnesses, or weighing of the evidence," *id.,* at 455, 105 S.Ct. at 2774, and upheld the board's decision based solely upon the testimony of a prison guard and his written report. *id.,* at 456-57, 105 S.Ct. at 2775. Thus, the statement of reasons provided by the committee in this case must be assessed not only in light of *Wolff's* procedural concerns but also in light of the substantive standards set forth in *Hill.*

Culbert v. Young, 834 F.2d 624, 630 (7th Cir. 1987). Applying both *Wolff* and *Hill*, the Court in *Culbert* reached the conclusion that "the kind of statements that will satisfy the constitutional minimum will vary from case to case depending on the severity of the charges and the complexity of the factual circumstances and proof offered by both sides, *see [Saenz v. Young*, 811 F.2d 1172 (7th Cir. 1987)]. The Constitution does not require that the evidence relied upon logically preclude any conclusion but the one reached by the disciplinary board ...." *Culbert v. Young*, 834 F.2d 624, 631 (7th Cir. 1987). Where it is "obvious" that a disciplinary committee believed the conduct report and disbelieved the plaintiff and there is no mystery about its reasons, even a statement of extreme brevity concerning the reasons for its findings is not below the constitutional minimum. *Saenz v. Young*, 811 F.2d 1172, 1174 (7th Cir. 1987). Equally, where the charges are serious or the factual circumstances complex, reliance on rote phrases to support a disciplinary committee's findings may not be sufficient. *Redding v. Fairman*, 717 F.2d 1105 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1282 (1984).

It is doubtful that the C.A.B. was confronted here with conflicting evidence. It had the conduct report. It also had Forbes' signed refusal. Assuming that the petitioner did not "admit" at the C.A.B. hearing to having refused Sgt. Crider's order—which is what his Traverse says—there is not the slightest suggestion that he *denied* the charge in the Conduct Report.

The Court has carefully examined the petitioner's claims and the documents submitted by both parties in light of the principles discussed above. The written statement contains sufficient information concerning the evidentiary basis of the committee's decision to permit the prisoner an informed understanding of the basis of its decision. The written

statement further contains sufficient information to permit the meaningful review by this Court to determine whether the decision was in fact supported by the constitutionally required "some evidence."[1]

In his Traverse, the petitioner shifts the focus of this claim by noting that the C.A.B.'s written findings or decision did not include an itemized assessment of the factors which are to be taken into account when determining what sanction is to be assessed. This refers to the fact that the hearing report recites "Appropriate for Offender and Offense" as the reason for the particular sanction which was imposed. There is no suggestion that other, arguably mandatory, factors were *not* "taken into account" in determining what sanction would be imposed. There is no requirement, due process or otherwise, for an elaborate analysis of factors which are inapplicable. This is especially true when the misconduct was clear, was an isolated event involving one offender, was not an act which at the time impacted beyond the immediate interaction between Forbes and Sgt. Crider and where the sanction imposed was neither exceptional nor severe. The C.A.B.'s statement of reasons for imposing the sanction it chose are clearly sufficient to permit meaningful review.[2]

Referral Of Report to Conduct Adjustment Board. The parties treat as an issue the fact that the Conduct as that

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[1]It is perhaps curious that the petitioner has failed to sandwich amongst his convoluted claims an explicit claim that the C.A.B.'s decision in his case was not supported by sufficient evidence. If the event such a claim is present in this action, the Court finds that the C.A.B.'s decision was in fact supported by the constitutionally sufficient "some evidence." In the event this claim is not present, this finding merely rounds out the picture.

[2] Again, the petitioner has not challenged the sanction as unjust or improper. The Court finds no basis in the documents before it to conclude that the sanction Forbes received was remarkable in any respect. Equally, however, the Court can and does conclude from the documents before it that the misconduct fully justified the sanction imposed.

Report was referred to a C.A.B., which has authority to impose more severe sanctions (including the loss of good time), rather than being handled by Forbes' Unit Team, which would have entailed a less formal resolution of the charge. Although the original petition is hardly clear on this issue, if it is there at all, it is one easily dispatched.

The petitioner has no due process interest to the classification of certain conduct as "minor" (thus involving only the unit team) rather than "major." *Culbert v. Young,* 834 F.2d 624 (7th Cir. 1987).[3] It follows from this that whether the decision to refer misconduct such as that which petitioner was charged with to the C.A.B. is unassailable on due process grounds. Alternatively, the respondents have established without contradiction that misconduct such as Forbes was charged with was uniformly referred to a C.A.B. for resolution.

---

[3] This portion of the Court's decision in *Culbert* rested on two grounds: first, the Court noted that "the due process clause of the fourteenth amendment in and of itself does not implicate the interest" which the prisoner sought to vindicate. *Id.* This observation is equally applicable here. Second, the Court recognized that a protected liberty could also arise under state law where the state, in its statute or regulation, uses "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed and [requires] that [the challenged action of prison authorities] will not occur absent specified substantive predicates . . . " *Id., quoting Hewitt v. Helms,* 459 U.S. 460, 471-72 (1983). It therefore examined the applicable Wisconsin statute in effect and concluded that it "establishes a procedural guideline to channel official discretion [in determining when to classify and treat alleged misconduct as major rather than minor] but does not limit the exercise of that discretion to the listed criteria." *Id.*

This analysis of Wisconsin law, of course, does not necessarily compel the same result with respect to Indiana prisoners. This Court, however, finds both Indiana's statutes and its administrative code **silent** as to the classification of offender misconduct in relation to the terms "major" and "minor" and as to whether such conduct is to be referred to a unit team or an institutional conduct adjustment board. A state's silence on a subject is the antithesis of mandatory language and a specified result. Therefore, this independent analysis of Indiana law on the subject yields the same result as reached in *Culbert.*

Absence of Suspicion/Probable Cause. The petitioner has no record of drug abuse or misconduct relating to controlled substances while in prison. He therefore points to the absence of any basis for "reasonable suspicion" or probable cause for Sgt. Crider's order. This argument ignores the urine drop rule and requirement pertaining to offenders assigned to the Custody Building and the Officer's Barber Shop. That rule has already been found to be reasonable. The reasonableness of the rule obviates the need for a specific basis for ordering a particular inmate to surrender a urine specimen on a specific occasion. As a convicted offender, the petitioner's privacy interests are limited in light of the overriding need to maintain institutional order and security. Nonetheless, the Supreme Court has recognized that a prisoner retains a remedy for "calculated harassment unrelated to prison needs." *Hudson v. Palmer,* 104 S.Ct. 3194, 3203 (1984). However, no arbitrariness or harassment is suggested by the factual allegations of the petition in this instance and it has been held, for good reason, that random drug screening in a prison setting passes constitutional muster. *Spence v. Farrier,* 807 F.2d 753 (8th Cir. 1986); *Storms v. Coughlin* 600 F.Supp. 1214 (S.D. N.Y. 1984).

Placement in Segregation. Following the C.A.B. hearing, the petitioner made threats against Sgt. Crider and another staff member. He was therefore placed in segregation. This was obviously for security reasons and not as a disciplinary measure. He did not suffer the loss of good time or any other interest cognizable under the Due Process Clause. Accordingly, notwithstanding that he disputes the claim that he threatened anyone, he was not entitled to due process protections before being placed in segregation. This point was recently noted by our Court of Appeals in *Castenada v. Henman*, 914 F.2d 981, 983 (7th Cir.1990):

> Contrary to Castaneda's assertion, the due process rights mandated by *Wolff* turn not upon the mere fact of discipline, but upon whether the disciplinary sanction imposed by prison officials implicates an inmate's liberty interest. *Wolff,* 418 U.S. at 557. Thus, the

> relevant question to this appeal is not whether Castaneda was in fact disciplined but whether the disciplinary sanction which he received implicated a protected liberty interest.

No such interest has been identified by the petitioner's placement in segregation. following the C.A.B. hearing.

Conclusion

The petitioner refused Sgt. Crider's order on August 15, 1990 that he submit to a urine test. The fact of his refusal was never a serious issue, nor is it here.[4] The procedural aspects of the ensuing disciplinary proceeding have been thoroughly examined. The petitioner was not denied "notice" of the rule or of the charge and was not denied any other recognized procedural right. The C.A.B.'s decision was adequately supported by the evidence before it and was adequately articulated. The petitioner is entitled to relief pursuant to 28 U.S.C. § 2254(a) only if "he is in custody in violation of the Constitution or laws or treaties of the United States." "The touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff v. McDonnell,* 94 S.Ct. 2963,2982 (1974). There was no arbitrary action in any aspect of the order, charge, disciplinary proceeding or sanction involved in the events identified in this action and there was no constitutional infirmity in the proceeding which would entitle Forbes to relief in this case. Accordingly, his petition for a writ of habeas corpus will be **denied** and this cause of action **dismissed with prejudice**.

---

[4]In addition to Sgt. Crider's statement in the Conduct Report and the petitioner's *written refusal* to submit to a urine test as ordered, the petitioner states in Part V of his disciplinary hearing appeal that

> [t]he reason that I would not submit to a urine test is because first, I did not know there was any rule or regulation and I have never been shown or told there was, that I was subject to a urine test....

While of course this particular statement was not available to the C.A.B. at the time of the hearing, it removes any doubt whatever concerning what actually transpired.

UNITED STATES COURT of APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 21, 1992

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

JERRY KEOWN FORBES,	)	Appeal from the United
	)	States District Court
Petitioner-Appellant,	)	for the Southern
	)	District of Indiana,
No. 91-2282 v.	)	Indianapolis Division.
	)	
CLARENCE TRIGG, Superintendent,	)	No. 90 C 1931
	)	
Respondent-Appellee.	)	**Larry J. McKinney,**
	)	*Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the respondent-appellee, all of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

UNITED STATES COURT of APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Submitted October 21, 1992

October 28, 1992.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

BOYD McCHRISTION,	)	Appeal from the
	)	United States
Plaintiff-Appellant,	)	District Court for
	)	the Northern District
No. 91-2518 v.	)	of Indiana,
	)	Ft. Wayne Division.
JACKR. DUCKWORTH, MR. WAGNER,	)	
MR. BRADLY, MR. JASPER, GORDON	)	
H. FAULKNER, CLOID L. SHULER,	)	No. 79 C 17
CHARLES A. PENFOLD, SERGEANT	)	
WILKE, and OFFICER SKIBANSKI,	)	
	)	Hon. **William C. Lee,**
Defendants-Appellees.	)	*Judge.*

ORDER

In a case now entering its teenage years, Boyd McChristion accuses prison officials of a medley of constitutional transgressions. 42 U.S.C. § 1983. The district court granted summary judgment to the defendants, adopting the magistrate judge's 48-page Report and Recommendation. We affirm in part and reverse in part.

I. BACKGROUND

McChristion filed his suit in 1979, only to have summary judgement granted to the defendants. He appealed and this court affirmed in part and reversed in part, remanding one claim for factual development. Court-appointed counsel then filed an amended complaint on plaintiff's behalf, changing the cast of defendants and bringing a new slate of allegations. The district court granted summary judgment on the amended complaint, and McChristion appeals.

II. DISCUSSION

While we read plaintiff's pro se brief liberally, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), many of his charges have either never been raised before or were not included in the amended complaint, and are therefore waived.[1] *Manning v. Ashland Oil Co.*, 721 F.2d 192, 197 (7th Cir. 1983) (amended complaint supersedes earlier complaint, unless it is incorporated by reference). The remaining claims may be grouped as follows: (1) that prison guards refused to bring him his personal effects while he was in administrative segregation, violating the Eighth Amendment; (2) that he was deprived of due process in hearings before the Conduct Adjustment Board (CAB); and (3) that officials deprived him of personal property without due process.[2]

---

[1]These are: (1) an Eighth Amendment claim based on working conditions in the prison kitchen; (2) a claim that commissary staff diverted funds earmarked for the inmate trust fund; (3) an Eighth Amendment claim for inadequate medical care; and (4) an Eighth Amendment claim regarding the alleged brutal activities of the "goon squad."

[2]McChristion also complains that the district court should not have dismissed his complaint with a suggestion for refiling, arguing that he has waited long enough for a hearing and should not have to refile his case to get one. This complaint arises from a misunderstanding of the district

(continued . . .)

* * *

As to the CAB hearings, McChristion maintains that the CAB refused to insure the appearance of defense witnesses, violating his due process rights under *Wolff v. McDonnell*, 418 U.S. 539, 564-66 (1974). *Wolff* guarantees a prisoner the right to call witnesses, but limits that right where calling witnesses would be "unduly hazardous to institutional safety or correctional goals." *Id.* at 566.

The hearing in question occurred on January 16, 1979, when two inmate witnesses McChristion wished to call on his behalf refused to appear. Plaintiff contends that the CAB should have forced the witnesses to attend. The CAB explains the witnesses' absence by stating that they were issued passes to attend the hearing but chose not to honor them; there is no suggestion that allowing the witnesses to testify would have been hazardous. We recently held that a "rule that permits correctional officials and inmates to refuse to appear at whim is unconstitutional." *Forbes v. Trigg*, No. 91-2282, slip op. at 17 (7th Cir. Sept. 15, 1992); *see also Dalton v. Hutton*, 713 F.2d 75, 78 (4th Cir. 1983) ("An inmate granted the right, albeit qualified, to call witnesses in his behalf loses it altogether, if any witness may refuse to testify for no reason whatever.") Though this case does not involve a prison rule, the CAB's actions in this instance -- allowing inmates to choose whether they will testify -- may have violated McChristion's due process rights. On the other hand, the testimony of the desired witnesses may have been irrelevant or repetitive, in which case the CAB could legitimately have excluded their testimony. *Forbes*, No. 91-2282, slip op. at 17. Since the record on this point is incomplete, we cannot adequately evaluate the defendants'

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[2](. . .continued)

court's order. That court did not suggest refiling--it granted summary judgment on all of plaintiff's federal claims. The only arena for "refiling" is state court, since the district court dismissed the pendent state claims without prejudice.

conduct. Accordingly, we reverse the district court's grant of summary judgment on this issue and remand for further proceedings.

* * *

To sum up: we reverse the district court's grant of summary judgment on McChristion's claim that the CAB deprived him of due process by not compelling inmate witnesses to appear at the January 16, 1979 disciplinary hearing. On remand, the district court should consider the evidence and our recent opinion in *Forbes v. Trigg*, then decide whether a legitimate reason existed for not securing the witnesses' testimony at the hearing. In all other respects, the district court is affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED.

Adult Disciplinary Policy

Procedures

1990

* * *

G. DISCIPLINARY HEARINGS

* * *

22. LAY ADVOCATE / WITNESS:

* * *

B. Witnesses:

(1). Offenders and/or staff requested to serve as witnesses in disciplinary hearings are not required to appear and testify.

(2). If an offender chooses to appear and testify, the witness is required to tell the truth, or be subject to disciplinary action. In cases where the charged offender is held in segregation the Screening Officer shall cause the "Notice to Witness/Lay Advocate," State Form 35447R to be completed and processed for the charged offender. If the witness chooses not to appear at the hearing but wishes to make a statement, the statement shall be written in the appropriate section of "Notice to Witness/Lay Advocate," State Form 35447R. If the witness chooses to appear at the hearing, the CAB chairman or Hearing Officer shall ensure the witness' statement is summarized in the appropriate space on the "Notice to Witness/Lay Advocate," State Form 35447R. The CAB Chairman or Hearing Officer shall cause the filing of "Notice to Witness/Lay Advocate," State Form 35447R to be placed in the confidential section of the offender's institution packet.

* * *

24. ADDITIONAL OFFENDER RIGHTS:

* * *

D. An offender may appear and speak in his own behalf, call witnesses, present evidence or present written testimony if a witness is not available. Denial of such requests shall be noted on the appropriate "Hearing Report", State Form 39586R2. The hearing committee shall call witnesses requested by the offender unless one or more of the following conditions are present:

(1). Testimony to be offered is irrelevant or repetitive.
(2). There is a lack of necessity for the testimony in order for the Hearing Officer or committee to have a full understanding of the offense and defense(s) asserted by the offender.
(3). The calling of the witnesses may jeopardize the individual or facility/institution safety or correctional goals.

E. The hearing committee or Hearing Officer is permitted to inquire of the offender or of the lay advocate what impact the testimony of a particular witness may have, and to what specific facts the witness will testify. If the hearing committee or Hearing Officer elects not to grant the witnesses requested by the offender, the hearing committee or Hearing Officer shall document on the disposition sheet Hearing Report, State Form 39586R2 the reason(s) for such denial and afford the offender reasonable opportunity to obtain statements from any witnesses in writing.

* * *

H. APPEAL OF DISCIPLINARY DISPOSITION

25. OFFENDER APPEALS:

A. An offender who desires to appeal a disciplinary disposition shall complete a "Disciplinary Hearing Appeal," State Form 39587R within ten (10) working days from the receipt of the decision. In the appeal, the offender shall state the specific reason such review is requested. Broad generalizations such as "I don't think I was treated fairly," or "The CAB denied me my rights," shall not be accepted as reasons for appeal.

B. The first level of appeal is to the facility/institution head or Assistant Supervisor of Parole Services/Adult who shall consider the offender's statements, review for any procedural errors and review for consistency in the application of sanctions in similar cases. The response shall be written on State Form 39887R, "Disciplinary Hearing Appeal," and forwarded to the offender. The facility/institution head or Assistant Supervisor of Parole Services/Adult is the final administrative review for appeals involving non-grievous loss sanctions.

C. An offender who is not satisfied with the appeal response from the facility/institution head or Assistant Supervisor of Parole Services/Adult regarding sanctions involving a grievous loss may appeal to the appropriate Final Review Authority, i.e., the Director of Adult Institutions for offenders housed in adult facilities/ institutions, the Supervisor of Work Release Services for work/study release participants and Correctional Units or the Supervisor of Parole Services for offenders assigned to RCA. The appeal shall be on State Form 39587R, "Disciplinary Hearing Appeal," and submitted within fifteen (15) working days from the date of receipt of the first level appeal response. The appeal shall include a copy of the first level response by the facility/ institution head or Assistant Supervisor of Parole Services/Adult.

D. Appeals at either level may be sustained, denied or remanded to the CAB or Hearing Officer upon cause for a rehearing. Sanctions imposed for Code violations and Code numbers may be reduced due to mitigating circumstances.

E. The final appeal shall be decided within thirty (30) days of the date that the appeal is received by the appropriate Final Reviewing Authority. The offender shall be notified of the results in writing.

* * *

INDIANA CODE (1988):

11-11-5-5 Disciplinary actions; hearing, advice and representation; timeliness of charge; witnesses; evidence; use of statements in criminal proceedings

Sec. 5. (a) Before imposing any disciplinary action, the department shall afford the person charged with misconduct a hearing to determine his guilt or innocence and, if guilty, the appropriate action. The charged person may waive his right to a hearing. Also, before a charge is made, that person and a departmental employee may agree to the types of disciplinary action enumerated in sections 3(2) and 3(3) of this chapter if no record of the conduct or disciplinary action is placed in the person's file. In connection with the hearing, the person is entitled to:

(1) have not less than twenty-four (24) hours advance written notice of the date, time, and place of the hearing, and of the alleged misconduct, and the rule the misconduct is alleged to have violated;

(2) have reasonable time to prepare for the hearing;

(3) have an impartial decisionmaker;

(4) appear and speak in his own behalf;

(5) call witnesses and present evidence unless the person conducting the hearing finds that to do so would subject a witness to a substantial risk of harm, or would result in the admission of irrelevant or repetitive testimony;

(6) confront and cross-examine witnesses, unless the person conducting the hearing finds:

(A) that to do so would subject a witness to a substantial risk of harm;

(B) that to do so would result in the admission of irrelevant or repetitive testimony; or

(C) based upon good cause stated on the record, that a witness is unavailable to attend the hearing;

(7) have advice and representation by a lay advocate of his choice in those hearings based upon a charge of institutional misconduct when the department determines he lacks the competency to understand the issues involved or to participate in the hearing, or when the punishment may be that specified in:

(A) section 3(5) of this chapter if the restitution is more than two hundred dollars ($200);

(B) section 3(8) of this chapter if the segregation is for more than fifteen (15) days; or

(C) section 3(6), 3(9), or 3(10) of this chapter;

(8) have a written statement of the findings of fact, the evidence relied upon, and the reasons for the action taken;

(9) have immunity if his testimony is used in any criminal proceeding;

(10) have his record expunged of any reference to the charge if he is found not guilty or if a finding of guilt is later overturned; and

(11) be reimbursed for state wages lost due to action taken pending the hearing if he is found not guilty or if a finding of guilt is later overturned.

Any finding of guilt must be supported by a preponderance of the evidence presented at the hearing.

(b) The department may not charge a committed person with a disciplinary rule violation unless it does so within ten (10) days of the date it becomes aware of that person's alleged involvement in misconduct.

(c) Consistent with the objective of adequate and effective representation and the integrity of the hearing system the department may adopt regulations which may limit the pool of persons eligible to advise and represent accused persons to inmates in the general population. In any event, facility or program employees and inmates may not directly or indirectly charge for advice or representation.

(d) Any statement made by an accused person to department employees during the course of an investigation or hearing is not admissible against him in any criminal proceeding arising out of the same incident unless the accused:

(1) was informed:

(i) of his right to remain silent;

(ii) that anything he says can and will be used against him in court;

(iii) of his right to have an attorney present during any questioning;

(iv) his right to have an attorney appointed for him if he is unable to afford an attorney; and

(v) that if he decides to answer any questions, he may stop answering at any time during the interrogation; and

(2) voluntarily, knowingly and intelligently waived his rights under clause (1) to remain silent or to have an attorney present, or both.

35-50-6-4 Credit time assignments

Sec. 4. (a) A person imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class I.

(b) A person may be reassigned to Class II or Class III if he violates a rule of the department of correction or, if he is not under the custody of the department, a rule of the penal facility in which he is imprisoned. However, a violation of a condition of parole or probation may not be the basis for reassignment. Before a person may be reassigned to a lower credit time class, he must be granted a hearing to determine his guilt or innocence and, if found guilty, whether reassignment is an appropriate disciplinary action for the violation. The person may waive his right to the hearing.

(c) In connection with the hearing granted under subsection (b), the person is entitled to:

(1) have not less than twenty-four (24) hours advance written notice of the date, time, and place of the hearing, and of the alleged misconduct and the rule the misconduct is alleged to have violated;

(2) have reasonable time to prepare for the hearing;

(3) have an impartial decisionmaker;

(4) appear and speak in his own behalf;

(5) call witnesses and present evidence;

(6) confront and cross-examine each witness, unless the hearing authority finds that to do so would subject a witness to a substantial risk of harm;

(7) have the assistance of a lay advocate (the department may require that the advocate be an employee of, or a fellow prisoner in, the same facility or program);

(8) have a written statement of the findings of fact, the evidence relied upon, and the reasons for the action taken;

(9) have immunity if his testimony or any evidence derived from his testimony is used in any criminal proceedings; and

(10) have his record expunged of any reference to the charge if he is found not guilty or if a finding of guilt is later overturned.

Any finding of guilt must be supported by a preponderance of the evidence presented at the hearing.

(d) A person may be reassigned from Class III to Class I or Class II or from Class II to Class I. A person's assignment to Class III or Class II shall be reviewed at least once every six (6) months to determine if he should be reassigned to a higher credit time class.

35-50-6-5 Deprivation of credit time

Sec. 5. (a) A person may, with respect to the same transaction, be deprived of any part of the credit time he has earned for violation of one (1) or more rules of the department of correction or, if he is not committed to the department, one (1) or more rules of the penal facility in which he is imprisoned. However, the violation of a condition of parole or probation may not be the basis for deprivation. Whenever a person is deprived of credit time, he may also be reassigned to Class II or Class III.

(b) Before a person may be deprived of earned credit time, the person must be granted a hearing to determine his guilt or innocence and, if found guilty, whether deprivation of earned credit time is an appropriate disciplinary action for the violation. In connection with the hearing, the person is entitled to the procedural safeguards listed in section 4(c) of this chapter. The person may waive his right to the hearing.

(c) Any part of the credit time of which a person is deprived under this section may be restored.

35-50-6-5.5 Credit time appeals

Sec. 5.5. A person who has been reassigned to a lower credit time class or has been deprived of earned credit time may appeal the decision to the commissioner of the department of correction or the sheriff.

Supreme Court, U.S.
FILED
JAN 13 1993
OFFICE OF THE CLERK

No. 92-1041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CLARENCE TRIGG, Superintendent,
Indiana Youth Center,

Petitioner,

v.

JERRY KEOWN FORBES,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For Writ of Certiorari To The
United States Court Of Appeals For
The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS IN THE CASE

The decision of the Seventh Circuit is reported at 976 F.2d 308, and is reproduced in the Appendix to the Petition at page 1a. The decision of the district court is not reported, and is reproduced in the Appendix to the Petition at page 23a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. Respondent received service of the Petition on December 19, 1992. This Brief in Opposition thus is timely filed in accordance with U.S. Sup. Ct. R. 15.2.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

The constitutional provision, statutes, and regulation involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Petition generally sets forth the Statement of the Case in an adequate fashion. However, respondent submits the following brief statement of facts, drawn from the Seventh Circuit's decision below, *see* Pet. App. at 2a-6a, for a more complete statement of the facts of this case.

The basic facts relevant to the disposition of the Petition are the following. Respondent Jerry Forbes was an inmate at the Indiana Youth Center ("IYC") in Plainfield, Indiana during 1990. On August 7, 1990, Forbes was assigned to work in the Officer's Barber Shop in the Custody Building of the IYC, and he began working in the Officer's Barber Shop on August 13, 1990.

Sgt. Clinton Crider supervised all inmates working in the Custody Building.

Forbes alleged that when he reported to work on August 13, 1990, Sgt. Crider informed Forbes that he did not like the fact that Forbes had been assigned to the Officer's Barber Shop, that he did not like Forbes personally because Forbes was a "jailhouse lawyer," and that he would take whatever steps were necessary to have Forbes removed from the work assignment.

On August 15, 1990, only two days after Forbes began to work in the Officer's Barber Shop, Crider ordered workers in the Custody Building, including Forbes, to submit to a urine test. Forbes objected. Based upon this refusal, Sgt. Crider reported Forbes for refusing to obey an order from a prison staff member.

The prison's Conduct Adjustment Board ("CAB") convened to hear Sgt. Crider's charge against Forbes on August 21, 1990. There, Forbes admitted that he refused to take the urine test that Crider had ordered, but went on to state his objections to the test. Among other things, he argued that the urine test was an unreasonable search and seizure, ordered by Crider without any justification and for purposes of harassing Forbes and other inmates.

At the hearing, Forbes attempted to call three witnesses on his behalf: Sgt. Crider, Major Alexander (Sgt.

Crider's immediate superior) and Superintendent Trigg (warden of the prison facility). All three witnesses refused to appear. Alexander and Trigg gave no reasons for refusing to appear, while Crider stated that "I can not [sic] witness because I am the author of the [disciplinary] report." *See* Pet. App. at 3a. Because a regulation in the DOC "Adult Disciplinary Policy Procedures" ("ADPP") provides that prison staff members may refuse to appear at disciplinary hearings if they do not wish to appear, *see* Pet. App. at 49a, Forbes was powerless to obtain testimony from these witnesses.

Forbes appeared at the hearing and testified on his own behalf. There were no live witnesses presented on behalf of the prison authorities. Instead, the only evidence presented against Forbes consisted of Crider's conduct report and a medical refusal form, which Forbes signed when he refused to take the urine test. Based on this evidence, the CAB found Forbes guilty of the offense of refusing to obey an order of a staff member. The CAB then stripped Forbes of 30 days good-time credit.

Forbes' subsequent administrative appeals of the CAB's decision were denied. Forbes' petition for a writ of habeas corpus, based on the constitutional infirmities in the urine test to which he refused to submit and in the disciplinary proceedings against him, was denied by both the district court and the Seventh Circuit below. *See* Pet. App. at 1a.

ARGUMENT

I. CERTIORARI IS IMPROPER IN THIS CASE BECAUSE PETITIONER PREVAILED, AND ANY DECISION ON THE ISSUES PRESENTED WILL HAVE NO IMPACT ON THE OUTCOME OF THE CASE.

The issues on which Petitioner claims that Forbes "technically" prevailed concern a prisoner's right to call witnesses at a prison disciplinary hearing and the prisoner's right to a "meaningful" administrative review of a prison disciplinary decision. However, on both issues, Forbes in fact lost. The Seventh Circuit found that Forbes was denied neither the right to call witnesses nor a meaningful administrative review. *See* Pet. App. at 17a-18a, 20a. Furthermore, as noted above, Forbes' habeas petition was denied by the courts below. The Petition thus seeks to present issues that can have no effect on the outcome of the case.[1] "A favorable ruling . . . would do nothing more than answer a hypothetical question and perhaps provide guidance in future cases." *Burnett v. Kindt*, 780 F.2d 952, 954 (11th Cir. 1986). "The case has therefore lost its character as a present, live controversy of the kind that must exist if [the Court] is to avoid advisory opinions on abstract

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[1] It is also worth noting, which Petitioner failed to point out, that Forbes has been released from prison. Thus, Forbes -- who *lost* on his petition for a writ of habeas corpus, and who could be the only proper party to be petitioning for certiorari -- lacks "a legally cognizable interest in the outcome" necessary for filing a petition for certiorari in this case. "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal quote omitted).

propositions of law." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972), *quoting Hall v. Beals*, 396 U.S. 45, 48 (1969). The Petition is therefore moot, and should be denied.

II. THE SEVENTH CIRCUIT'S HOLDING, STRIKING DOWN THE INDIANA DEPARTMENT OF CORRECTIONS' RULE THAT OFFENDERS AND STAFF REQUESTED TO SERVE AS WITNESSES IN PRISON DISCIPLINARY HEARINGS ARE NOT REQUIRED TO APPEAR AND TESTIFY, PROPERLY CONFORMS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND WITH THE HOLDINGS OF THIS COURT.

Wolff v. McDonnell, 418 U.S. 539 (1974), establishes that a prisoner is entitled to certain minimum procedural safeguards in a prison disciplinary hearing where liberty interests are at stake, such as the good-time credits that the CAB revoked from Forbes.[2] One of the procedural safeguards provided in disciplinary hearings is the qualified right to call witnesses. *Id.* at 566.

As noted above, the DOC has a rule which provides, "Offenders and/or staff requested to serve as witnesses in disciplinary hearings are not required to appear and testify." Pet. App. at 49a. Forbes wished to call three witnesses to defend himself: Sgt. Crider; Major Alexander, Sgt. Crider's boss; and Supt. Trigg. All three witnesses refused to appear, and the only explanation given for why the CAB did not call these

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[2] The State of Indiana has codified the *Wolff* requirements in Ind. Code § 11-11-5-5 (relating to the type of hearing required for any disciplinary action), and §§ 35-50-6-4(c), 5, and 5.5 (relating to the type of hearing required when good-time credits may be revoked).

witnesses, in harmony with the ADPP regulation, was that they refused to appear.

Contrary to the allegations in the Petition, the Seventh Circuit correctly held that the ADPP regulation on witnesses is unconstitutional. In so doing, the Seventh Circuit followed the consistent line of court of appeals' decisions that have held similar rules unconstitutional, in violation of the rights set forth in *Wolff*.

A regulation similar to the ADPP regulation, which prevented a prisoner from calling two staff members at a disciplinary hearing because they would not voluntarily appear, was struck down by the Fourth Circuit in *Dalton v. Hutto*, 713 F.2d 75 (4th Cir. 1983). As the *Dalton* court noted, *Wolff* mandates that certain procedures be followed in prison disciplinary hearings to insure that due process is satisfied. The right to call witnesses has been qualified (*e.g.*, where calling witnesses would be unduly hazardous to institutional safety or correctional goals, or where the testimony would be irrelevant or unnecessary), but it remains a key part of the procedural due process that must be afforded inmates.

> [A] restriction to unrestrained "voluntariness" . . . exceeds the boundaries of constitutional fairness. One needs no "right" to call a witness who voluntarily presents himself to testify. . . . An inmate granted the right, albeit qualified, to call witnesses in his behalf loses it altogether, in any meaningful employment of language, if any witness may refuse to testify for no reason whatsoever. . . . "[T]he decision to preclude the calling of witnesses should be made on a

> case-by-case analysis of the potential hazards which may flow from the calling of a particular person."

Id. at 78, *quoting Bartholomew v. Watson*, 665 F.2d 915, 918 (9th Cir. 1982).

The decision in *Dalton* is well-reasoned, and one which has been followed by every court that has addressed the issue, as the Seventh Circuit below recognized. *See* Pet. App. at 15a-16a. *See also Ramer v. Kirby*, 936 F.2d 1102, 1104 (10th Cir. 1991); *King v. Wells*, 760 F.2d 89, 93 (6th Cir. 1985); *White v. Wyrick*, 727 F.2d 757 (8th Cir. 1984). Like the witness rule struck down in *Dalton*,

> The IDOC rule eviscerates the inmate's right to present witnesses. It vests unreviewable discretion to appear in correctional officials (like the charging officer) and other inmates who may have played significant roles in an inmate's disciplinary charge and punishment.

Pet. App. at 17a.

Requiring that "the decision to preclude the calling of witnesses should be made on a case-by-case analysis of the potential hazards which may flow from the calling of a particular person," *Dalton*, 713 F.2d at 78 (cite omitted), balances the needs of the prison system against the due process rights of prisoners. Indeed, the result follows logically from *Wolff*. *See Wolff*, 418 U.S. at 566 (disciplinary committees should state reasons for refusing to call witnesses, "whether it be for irrelevance, lack of necessity, or the hazards presented *in individual cases*" (emphasis added)). The decision of the Seventh Circuit also accords with this Court's disapproval of "across the

board" policies denying witness requests, *Ponte v. Real*, 471 U.S. 491, 496 (1985) -- as Petitioner himself concedes. Pet. at 9.

In an attempt to find a conflict among the circuits where none lies, Petitioner argues that the Eighth Circuit's decision in *White v. Wyrick* conflicts with the other circuit court authority cited above. *White* in fact accords with these cases. There, the Eighth Circuit distinguished between cases in which a prisoner faces a minor penalty (e.*g.*, a few days in solitary confinement) and those in which the prisoner's release from prison might be postponed, "either by affecting his eligibility for parole or by causing revocation of any good-time credits that he might have." 727 F.2d at 758. White merely faced the risk of ten days in solitary confinement; by contrast, the CAB in the instant case revoked 30 days of Forbes' good-time credits. Under the circumstances of the instant case, where good-time credits were revoked, *White* clearly accords with the holdings of the Seventh Circuit and the other courts cited above, that a rule such as the ADPP regulation permitting only voluntary witnesses at disciplinary hearings is unconstitutional. *See id.* *See also Moran v. Farrier*, 924 F.2d 134, 137 (8th Cir. 1991) (prison officials may not arbitrarily deny inmate's request to call witnesses at hearing).

Furthermore, Petitioner's argument that the Seventh Circuit's holding in this case and the holdings of the other circuit courts that have addressed the issue somehow mandate

"compulsory process" in every prison disciplinary hearings is flatly incorrect. What these decisions hold, quite simply, is that prison disciplinary officials should determine on a case-by-case basis, balancing the needs of the prison system and the due process rights of prisoners, whether a particular prisoner's witnesses should be called. *See supra*. If legitimate reasons exist for not calling a particular witness (*e.g.*, unduly hazardous to institutional safety or correctional goals, or testimony irrelevant or unnecessary), then the witness need not be called, as the Seventh Circuit recognized below, Pet. App. at 16a. *See also Wolff*, *supra*; *Dalton*, 713 F.2d at 77-78. But the decision as to whether a particular witness should be called to testify should not be made flatly on an "across the board" policy that excludes whole categories of witnesses. *See Ponte v. Real*, 471 U.S. at 496; Pet. App. at 16a-17a (cites omitted).[3]

The Seventh Circuit's decision on the ADPP witness regulation does not "mudd[y] the parameters of due process in prison hearings" (Pet. at 10), but rather clearly accords with the relevant holdings of the other circuit courts and this Court.

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[3] In this regard, Petitioner's speculation that "[t]he opportunity for inmates to retaliate against officers and other inmates by forcing them to attend and testify at disciplinary hearings will disrupt the balance so carefully considered in *Wolff*" (Pet. at 13) is meritless. As explained in the text, if legitimate reasons exist for not calling a particular witness, then the witness properly need not be called to testify. By requiring case-by-case consideration of whether a particular witness should or should not be called to testify, the Seventh Circuit's decision in this case preserves "the balance so carefully considered in *Wolff*."

It therefore does not present an appropriate basis for certiorari.

III. THE SEVENTH CIRCUIT'S STATEMENT THAT MR. FORBES HAD A DUE PROCESS RIGHT TO "MEANINGFUL" ADMINISTRATIVE REVIEW OF THE DISCIPLINARY SANCTION WAS CORRECT.

Ind.Code § 35-60-6-5.5 provides for the right to administrative review of prison disciplinary decisions. *See* Pet. App. at 57a. "While [the right to a meaningful review of a disciplinary decision] may only be implicit in *Wolff*, the State of Indiana gives the specific right to inmates, I.C. 35-50-6-5.5. . . . If a state imparts a due process right, then it must give that right." *Smith v. Stoner*, 594 F. Supp. 1091, 1110 (N.D. Ind. 1984). "A review cannot be merely pro forma, a review must be one of substance, reviewing all aspects of the prior proceedings." *Id.* *See also Feagin v. Broglin*, 693 F. Supp. 736, 739 (N.D. Ind. 1988).

In its decision below, the Seventh Circuit followed this line of authority, but held that Forbes, on the record presented, had been granted meaningful administrative review in this case. *See* Pet. App. at 20a. Petitioner argues that the Seventh Circuit's statement that "*Smith* is correct," Pet. App. at 20a, is incorrect. Certainly, as *Smith*, 594 F.Supp. at 1105, recognizes, a state-created procedural right, on its own, does not create a liberty interest. However, where a substantive right (in this case, Forbes' good-time credits) comes with

certain attendant procedural guarantees, officials must abide by those guarantees. *See Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (state went beyond simple procedural guidelines, requiring that certain procedures be employed, and that administrative segregation would not occur absent specified substantive predicates); *see also Smith* at 1110; *Feagin*, *supra*.[4] The Seventh Circuit's decision on the issue of "meaningful" administrative review thus presents no issue appropriate for certiorari.

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[4] Furthermore, "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974); *Superintendent v. Hill*, 472 U.S. 445, 460 (1985) (Stevens, J., concurring in part and dissenting in part) (*quoting Ross*). Even if the Seventh Circuit's statement went beyond the requirements of *Wolff*, "that is a manifestly insufficient reason for adding this case to [the Court's overburdened] argument docket." *Ponte v. Real*, 471 U.S. at 501 (Stevens, J., concurring in part). Indeed, as explained above, the questions presented in the Petition are moot.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1041

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CLARENCE TRIGG, Superintendent,
Indiana Youth Center,
Petitioner,

v.

JERRY KEOWN FORBES,
Respondent.

CERTIFICATE OF SERVICE

I, Bruce M. Zessar, hereby certify that three copies of Respondent's Brief in Opposition to the Petition for Certiorari in this case, together with three copies of Respondent's Motion to Proceed In Forma Pauperis, were served upon counsel listed below by U.S. mail, first-class postage prepaid, on January 13, 1993, and that all parties required to be served have been served:

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I declare under penalty of perjury that the foregoing is true and correct.

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